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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1949

No. 438

**ORDER OF RAILWAY CONDUCTORS OF AMERICA,
AN UNINCORPORATED ASSOCIATION, PETI-
TIONER,**

vs.

**SOUTHERN RAILWAY COMPANY, A CORPORA-
TION ORGANIZED AND EXISTING UNDER THE
LAWS OF THE STATE OF VIRGINIA**

**ON WRIT OF HABEAS CORPUS TO THE SUPREME COURT OF THE STATE
OF SOUTH CAROLINA**

PETITION FOR HABEAS CORPUS FILED OCTOBER 20, 1949.

HABEAS CORPUS GRANTED DECEMBER 12, 1949.

The State of South Carolina IN THE SUPREME COURT

No.

APPEAL FROM CHARLESTON COUNTY
HONORABLE WILLIAM H. GRIMBALL, CIRCUIT JUDGE.

*SOUTHERN RAILWAY COMPANY, a corporation
organized and existing under the laws of the State
of Virginia, Plaintiff-Respondent,*

against

*ORDER OF RAILWAY CONDUCTORS OF
AMERICA, an unincorporated Association, De-
fendant-Appellant.*

TRANSCRIPT OF RECORD

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STATEMENT

This action was commenced in the Court of Common Pleas for Charleston County by the service of a summons and complaint on the 12th day of July, 1945. It is a suit for a declaratory judgment brought under the provisions of Section 660, Code of Laws of South Carolina, 1942, by Southern Railway Company, a Virginia corporation engaged as a common carrier by railroad in South Carolina and other states, against Order of Railway Conductors of America, an unincorporated association and the duly authorized representative and bargaining agent of the craft and class of conductors employed by plaintiff.

The *complaint*, among other things, alleges an actual controversy between plaintiff and defendant concerning the rights and obligations of plaintiff and the conductors under a contract or agreement between Southern Railway Company and Order of Railway Conductors of America, effective May 16, 1940, entitled "Schedule of Wages, Rules and Regulations of Conductors", and a disagreement as to the proper construction thereof. It prays, among other things, a declaratory judgment declaring whether certain services and movements described in the complaint as "such industry switching as is necessary at the plant of the Defense Plant Corporation operated by the Ancor Corporation at Pregnall, South Carolina, Pregnall being an intermediate point on plaintiff's line of railroad between Charleston, South Carolina and Branchville, South Carolina," are a part of the regular service trips of conductors in charge of local freight trains between Charleston and Branchville, and be-

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tween Branchville and Charleston, South Carolina, or whether the conductors performing services and movements of the kind above described are entitled to additional pay at the rate of a minimum day's pay or \$9.10 a day for performing such services separate and apart from and in addition to the pay for their regular service trips assigned from Charleston to Branchville and from Branchville to Charleston, all as more particularly set forth in said complaint. The amount involved is set forth in the complaint to exceed \$10,000.00.

The *answer* of defendant admits that a controversy or dispute exists in regard to the interpretation and application of the written contract or agreement with respect to the services and movements in question. It denies that the Ancor Corporation plant is at Pregnall and alleges on the contrary that it is located $6\frac{3}{4}$ miles therefrom. It alleges that said plant is located on a branch or connecting track owned by the Defense Plant Corporation, denies that the services and movements between Pregnall and the plant of the Ancor Corporation are a part of the regular service trips of conductors assigned on Plaintiff's line between Charleston and Branchville, admits that defendant demands additional pay for conductors performing such services, denies that plaintiff has compensated said conductors in accordance with the terms of the written contract or agreement, denies that plaintiff is entitled to the declaratory judgment sought, admits certain allegations of the complaint and denies others and alleges further matters, including objections to the jurisdiction of the court to render the declaratory judgment sought in view of the act of Congress commonly known as the Railway Labor Act, 48 U. S. Statutes 1195, 45

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U. S. C. A., Section 151, *et seq.*, all as more particularly set forth in said answer.

The issues made by the Complaint and Answer are whether or not a Declaratory Judgment should be entered on such facts as might be proved under the allegations of the Complaint and the Answer thereto, which admits certain allegations, denies others, and alleges further matters including the terms of the Act of Congress, commonly known as the Railway Labor Act, 48 U. S. Stat., 1195, 45 U. S. C. Section 151 *et seq.*, and whether, if it be held that a Declaratory Judgment should be entered, the contract should be construed, interpreted and applied as claimed by plaintiff or as claimed by defendant.

This case came once before to the Supreme Court of South Carolina upon appeal of plaintiff from an order sustaining a demurrer to the complaint, on the grounds set out below, which order was reversed by the Supreme Court in its opinion rendered on the 13th day of February, 1947, 210 S. C., 121, 41 S. E. (2d), 774, and the cause was remanded to the Court of Common Pleas of Charleston County for trial on the merits.

The case came on for trial before Honorable William H. Grimball, Circuit Judge, at Charleston on the 23rd day of June, 1947, sitting in equity. Upon the call of the case for trial defendant filed with the Court a reservation of its objections, jurisdictional and otherwise, under the Railway Labor Act of Congress, as more particularly set forth in said Reservation hereinbelow printed. Defendant also moved at the same time for an order permitting it to amend its Answer so as to set forth among other things that subsequently to the institution of this action, the claims of the con-

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ductors involved in this action had been submitted to and were now pending before the National Railroad Adjustment Board, pursuant to the terms of the Railway Labor Act, which motion was refused by the Trial Judge and exception duly noted. The said motion and grounds are set forth below.

The testimony and evidence introduced by both sides and printed below took so wide a range as not to be susceptible of a concise narrative to which both sides can agree.

At the conclusion of all the evidence in the case of both plaintiff and defendant, defendant moved to dismiss the action on the grounds set forth in its motion hereinafter printed, which grounds were based upon the terms of the Railway Labor Act of Congress and the Court decisions rendered thereunder. The said motion was refused by the Trial Judge and exceptions duly noted.

His Honor, the Trial Judge, thereafter upon the 30th day of August, 1947, filed his decree awarding to the plaintiff the declaratory judgment prayed in its complaint. Within due time, to wit, on the 6th day of September, 1947, notice of appeal to the Supreme Court of South Carolina from the said decree was duly served by defendant upon attorneys for plaintiff.

COMPLAINT FOR DECLARATORY JUDGMENT

The plaintiff, Southern Railway Company, complains of the above-named defendant and avers:

1. This is a suit of a civil nature for a declaration under the Declaratory Judgments Statute, Code of Laws of South Carolina, 1942, section 660, of the rights

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of the plaintiff under a certain written contract or agreement of May 16, 1940, hereinafter more specifically referred to and made an Exhibit hereto.

2. Plaintiff is a corporation duly incorporated and existing under the laws of the Commonwealth of Virginia, and is engaged as a common carrier in the business of operating lines of railroad in interstate and intrastate commerce, in various states of the United States including the State of South Carolina.

3. Defendant, Order of Railway Conductors of America, is an unincorporated association engaged in union activities in the various states of the United States, including the state of South Carolina, and the County of Charleston in said state, in which County the defendant maintains an agent and is engaged in carrying on the activities for which it was organized, and is subject to suit and service of process under the provisions of sections 7796-7797 of the Code of Laws of South Carolina, 1942.

4. Plaintiff employs many persons who perform, or have seniority rights to perform, service as conductors on its trains on its Charleston Division, which is part of the lines of railroad operated by it in the State of South Carolina. Such persons so employed by the plaintiff represent a class of employees whose duly authorized representative and bargaining agent is the defendant, the Order of Railway Conductors of America.

5. An actual controversy exists between plaintiff and defendant, concerning the rights and obligations of plaintiff and of the aforementioned class of employees under a certain written contract or agreement entitled "Schedule of Wages and Rules and Regula-

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tions for Conductors," a copy of which is attached hereto and made a part hereof as Exhibit "A", which agreement became effective May 16, 1940, has continued in effect since that date, and is presently in effect, by and between plaintiff and defendant, the defendant acting in the making of said agreement through its General Committee on Adjustment as evidenced by the signature of its General Chairman. Said controversy consists specifically of a disagreement between plaintiff and defendant as to the proper construction to be placed upon certain provisions of the said contract or agreement regarding work required to be performed by conductors, who are represented by defendant, on certain local freight trains at Pregnall, South Carolina, on plaintiff's Charleston Division, and whether or not the performance of certain services at Pregnall, South Carolina, as hereinafter more fully set forth, may not be required of such conductors unless paid separate compensation (*i. e.*, an additional minimum day), over and above the compensation paid to and received by them for their services as conductors of local freight trains operating between Charleston and Branchville.

6. Plaintiff is engaged, among many other operations in South Carolina, in the operation of certain local freight trains between Charleston, South Carolina, and Branchville, South Carolina, and between Branchville, South Carolina, and Charleston, South Carolina, Pregnall, South Carolina, being an intermediate point. The said freight trains used by plaintiff in said operation between Charleston, South Carolina, and Branchville, South Carolina, and between Branchville, South Carolina, and Charleston, South Carolina, are manned by crews composed of a conductor, who is

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in charge of the train, an engineer, a fireman, a flagman, and a brakeman. When plaintiff's local freight trains are westbound toward Branchville, South Carolina, the conductors go on duty at Charleston, South Carolina, and are relieved from duty at Branchville, South Carolina, a distance of approximately sixty-three miles, the average time consumed on the run being six and one-half hours and the average time of conductors each day being approximately eight hours and thirty-nine minutes. When plaintiff's local freight trains are eastbound toward Charleston, South Carolina, the conductors go on duty at Branchville, South Carolina, and are relieved from duty at Charleston, South Carolina.

7. As a part of the regular service trip of the said conductors, who are in charge of said freight trains and as an incident to and in connection with the movement of said freight trains between Charleston, South Carolina, and Branchville, South Carolina, and between Branchville, South Carolina, and Charleston, South Carolina, said conductors when in charge of westbound local freight trains are instructed to perform such industry switching as is necessary at the plant of the Defense Plant Corporation operated by the Ancor Corporation at Pregnall, South Carolina, Pregnall being a point on plaintiff's line of railroad between Charleston, South Carolina, and Branchville, South Carolina, in the same manner they do other industry switching. Said industry switching at Pregnall, South Carolina, consists of the westbound local freight train taking a car or cars, whose destination is the plant of the Ancor Corporation, over the industry track owned by the Defense Plant Corporation, which track connects with plaintiff's main line at Pregnall,

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South Carolina, to the plant of said Ancor Corporation, and there placing said car or cars on a designated track or tracks and then picking up any car or cars to be removed from the plant of the said Ancor Corporation.

8. Movements of the type described in Paragraph 7 next above, commonly known as "industry switching," which are required to be made by plaintiff's local freight train crews, including the aforesaid conductors have been made and are being made by plaintiff's conductors every day over the industry tracks of innumerable industries served by plaintiff, and have been so made continuously at least since 1910 without demand for or payment of extra compensation such as is here demanded.

9. The said conductors of plaintiff, and who run on plaintiff's Charleston Division, are compensated at the established mileage and hourly rates, provided for in said written contract, for the performance of work which plaintiff's said conductors are required to perform under the provisions of said agreement. Article 5 (a) and 7 of said agreement, a copy of which is attached hereto and made a part hereof (as Exhibit "A"), provide for the payment of compensation to said conductors. The rates of pay are provided for in the schedule of wages of the agreement, which wages have been increased by subsequent supplementary agreements since the effective date of the said agreement of May 16, 1940. The present base rate of compensation payable (in effect since December 27, 1943), and which is paid to said conductors who are in local freight service, is \$9.10 per day, which covers 8 hours service or less, 100 miles or less. If service is rendered in excess of 8 hours, in respect to conductors in local

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freight service on runs of 100 miles or less, in addition to the above-named minimum payment, said conductors would be entitled to pay for overtime on minute basis at an hourly rate of $3/16$ of the daily rate (commonly called time and one-half), and in such a case would, under the provisions of Article 7 of the said agreement, be paid for such overtime at the rate of 2.846¢ per minute, which is at the rate of \$1.70 per hour.

10. The said conductors on plaintiff's trains between Charleston, South Carolina, and Branchville, South Carolina, who perform the work of switching the said Ancor Corporation plant, and operate as described in Paragraph 7 hereof, are on a so-called "straightaway" run as referred to in Article 5 (a) of said agreement and are in so-called "local freight" service, and for such service are compensated under the terms and provisions of the schedule of wages of the said written agreement, as amended, for said type of services; that is, so-called "local freight" service in the manner and to the extent shown in Paragraph 9 next above.

11. Notwithstanding that plaintiff's said conductors have always performed the service of switching on industry tracks as an incident to part of their road trip, and notwithstanding that said conductors have always been paid and compensated by plaintiff for such service in accordance with the terms of the said contract between plaintiff and defendant, that is to say, on basis of a minimum day and overtime, if earned, said conductors who perform the said switching at the plant of the Ancor Corporation, through defendant, the duly authorized representative and bargaining agent of the conductors in the employ of plaintiff, are now claiming and have demanded pay for said service at Pregnall,

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South Carolina, a compensation in excess of that provided by said contract, to wit, additional compensation at the rate of a minimum day's pay, \$9.10, separate and apart from and in addition to their regular pay of \$9.10, for their service trip, which said regular pay of \$9.10 is exclusive of any overtime, and this claim is made even though their service trip and the payment therefor includes switching on industry tracks. The said claim for an additional day's pay is based on the contention of the defendant (despite the provisions to the contrary contained in the written agreement of May 16, 1940, as herein averred) that said conductors are entitled to such additional day's pay because of the switching service performed in serving the plant of the Ancor Corporation.

On or about October 10, 1944, the defendant, through its General Chairman, started filing claims with plaintiff for the said additional day's pay for the said conductors who are required to perform the service of switching at the plant of the Ancor Corporation, defendant alleging that the performance of industry switching at the plant of the Ancor Corporation entitles conductors to an additional day's pay, separate and apart from and in addition to their pay for their service trip from Charleston to Branchville. Plaintiff, on the other hand, insists that the regular day's pay for the service trip includes performance of said switching without additional charge therefor.

12. On page 67 of said contract of May 16, 1940, with defendant, the duly authorized representative and bargaining agent of the conductors in the employ of plaintiff, is a paragraph entitled "Terms of Agreement" which provides:

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"This agreement supersedes and cancels all former agreements but does not, except where rules are changed, alter former accepted and agreed to practices, working conditions or interpretations."

As heretofore stated in Paragraph 8 hereof, all of the switching movements of the type described in Paragraph 7 are movements similar to those made every day on innumerable other industry tracks which join plaintiff's line of railroad, and it has always been an accepted and agreed to practice for the conductors of plaintiff's local freight trains to perform the service of the type described in Paragraph 7, that is, switching on industry tracks, as a part of their service trip under and pursuant to the terms of said contract. Plaintiff's said conductors have accepted the compensation paid them as in full for all service performed with the exception stated in numbered paragraph 8 hereof, including the work of switching on industry tracks, which is a part of their service trip, but since about October 10, 1944, said conductors who are performing the work of switching at the Ancor Corporation at Pregnull, the work of the type described in Paragraph 7, through defendant, are asserting rights contrary to the said contract, and now demand an additional day's pay for performing the type of service described in Paragraph 7, a payment not provided for in said contract and which they have never received for such service.

13. Said claim made by defendant for the conductors who switch the plant of the Ancor Corporation as detailed in Paragraph 11 hereof would, if sustained, necessitate a continuing additional expenditure by plaintiff to serve this one industry of a sum of ap-

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proximately \$2,848.00 per year, if the plant were switched every working day. Further, should the labor organizations representing crew members other than conductors, contend and ultimately establish that the provisions of their contracts, similar to those involved in the conductors' agreement here involved, are to be construed as defendant contends, plaintiff would be liable for an additional payment of approximately \$10,579.00 per annum to such other crew members on account of switching this one industry, provided it be switched each working day. The said claim of the conductors having been brought to the attention of the plaintiff as hereinbefore averred, plaintiff has, after due consideration, notified defendant of the rejection of said claim and an actual controversy between plaintiff and defendant results.

14. Plaintiff is without an adequate and complete remedy at law or in equity other than the present suit for a declaration of rights in the premises, for the following reasons: Neither the defendant nor any of the said conductors has instituted any judicial proceedings asserting said claim wherein plaintiff would have the opportunity and right to show that the claim now being made by defendant is invalid and improper and not in accord with the provisions of the said written contract of May 16, 1940, and to show that the said conductors in the employ of plaintiff may properly be required, under the terms of said agreement to perform, at the rate of compensation provided in said agreement, the movements at Pregnall, South Carolina, of the type hereinbefore described in Paragraph 7, the type of movements which defendant now claim should entitle said conductors who make said movements to an extra or additional day's pay separate and

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apart from said conductors' pay for the day's service trip. Although the issues upon which the validity of said claim depends present justiciable questions, there is no means by which plaintiff can compel or induce defendant to institute judicial proceedings for the determination of said issues, and, therefore, plaintiff is without judicial remedy except by this proceeding. Plaintiff, therefore, so long as there is no judicial determination of the claim now being made by defendant or by any of the said conductors and no judicial interpretation of said agreement of May 16, 1940, applicable to said claim, will be prejudiced by an accumulation of claims for a large total amount and plaintiff will be unable correctly to state its accounts, to compute and pay its taxes, or to know the cost to it of performing service, which last is a material factor in fixing its lawful transportation rates.

15. Plaintiff avers that by reason of each and all of the facts aforesaid, the only judicial remedy available to plaintiff, in order to avoid irreparable injury and damage, is to bring this suit in this Honorable Court, praying a declaratory judgment or decree by this Court with respect to the actual controversy hereinbefore set forth, and a declaration by this Court of the rights, obligations, and other legal relations of the parties hereto with respect to such controversy.

Wherefore, plaintiff prays this Honorable Court to render a declaratory judgment or decree, declaring that the switching movements at the plant of the Ancor Corporation at Pregnall, South Carolina, movements of the type hereinbefore described in Paragraph 7, are a part of the said conductor's service trip under the provisions of the agreement of May 16, 1940, hereinbefore referred to, as uniformly interpreted by the

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parties thereto for many years, and that plaintiff is only obligated to pay for such work, at the applicable and governing rate of compensation specified in said agreement as modified by the supplementary agreement mentioned in Paragraph 9 hereof and denying defendant's claim of entitlement to an additional day's pay separate and apart from the pay for their service trip from Charleston to Branchville for performing said switching at Pregnall, South Carolina.

And further declaring that the plaintiff is under no legal liability to satisfy said claim or any similar claim which has been made or may be made by defendant;

And further declaring the rights, obligations and other legal relations of plaintiff and defendant regarding the matters and things hereinbefore averred and granting plaintiff such further relief as this Honorable Court may deem meet and proper in the premises.

FRANK G. TOMPKINS,

J. M. COHEN,

L. M. ABBOTT,

BARNWELL & WHALEY,

Attorneys for Plaintiffs.

(Verified.)

EXHIBIT "A"

A sufficient number of copies of the already printed pamphlet constituting Exhibit "A" to the complaint and entitled "Southern Railway Company—Schedule of Wages and Rules and Regulations for Conductors" are filed along with and as a part of the Transcript of Record.

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ANSWER

Order of Railway Conductors of America, an unincorporated association, defendant above named, saving and reserving to itself the right to remove this cause and claiming to have already moved the same into the District Court of the United States for the Eastern District of South Carolina in accordance with the Acts of Congress in such case made and provided and the right to answer, plead, and demur in the said District Court of the United States for the said District and subject to the said removal and insisting on the same but answering out of respect for and courtesy to this Honorable Court, for answer to the complaint of the above-named plaintiff shows and alleges as follows:

1. Defendant admits the allegations of Article 1 of the complaint, but denies that plaintiff is entitled to maintain such an action because of the terms and provisions of the Acts of Congress commonly known as the Railway Labor Act, 48 U. S. Stat., 1195, 45 U. S. C. A. Sec. 151, *et seq.*, and the matters and facts hereinafter alleged.

2. Defendant admits the allegations of Article 2.

3. Answering Article 3, defendant shows that it is a voluntary, unincorporated association, and a railway labor union, national in scope, having a written constitution and laws, a copy of which is attached hereto or filed herewith, marked Exhibit 1, and made a part hereof, and that for many years last past, and at the present time, the General Committee of Adjustment of the Order of Railway Conductors has been and now is the duly accredited bargaining agent and representative of the class and craft of conductors on the Southern Railway Company. Defendant admits that

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there is a Local Committee of Adjustment and a Local Chairman of said committee in the County of Charleston, in the State of South Carolina, and denies any knowledge or information, sufficient to form a belief, as to the remaining allegations of said Article.

4. Answering Article 4, the defendant admits that plaintiff employs many persons who perform, or have seniority rights to perform, service as conductors on its trains on its Charleston Division, which is part of the plaintiff's lines, and defendant admits that such persons so employed by plaintiff are represented by the General Chairman of the Order of Railway Conductors of America on plaintiff's lines. Defendant denies the remaining allegations of Article 4.

5. Answering Article 5, defendant admits that a controversy or dispute exists in regard to the application of the contract or agreement Exhibit "A" as to the terms whereof defendant makes reference to the original agreement, to certain additional services required by plaintiff of train conductors on certain local freight trains, on plaintiff's Charleston Division, operating between Charleston and Branchville, South Carolina, and whether or not such conductors are entitled to additional compensation for such additional services, under said contract and the established practice, on the lines of the Southern Railway Company in regards to rules, working conditions, and rates of pay. Defendant admits that Exhibit "A" attached to plaintiff's complaint, and entitled "Schedule of Wages, Rules and Regulations for Conductors", became effective May 16, 1940, has continued in effect since that date, and is presently in effect, except as to change in rates of pay. Defendant denies the remaining allegations of said Article and shows that the present action, instituted

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in advance of action by the National Railroad Adjustment Board, is premature and would permit plaintiff, in effect, to side-step and bypass the Railway Labor Act to defeat the purposes and policy thereof, and constitutes an attempt to deny to this defendant, its Local Chairman of Adjustment, the General Committee of Adjustment and the General Chairman and the individual conductors the rights and benefits of the said Railway Labor Act and the procedure set forth therein for the adjustment and determination of disputes between carriers and employees with reference to the application of agreements concerning rates of pay, rules, or working conditions.

6. Answering Article 6, defendant admits the allegations thereof except that defendant is without knowledge or information, sufficient to form a belief, as to the average time consumed on said runs and therefore denies that the average time on said runs is $7\frac{1}{2}$ hours. Defendant shows that vacancies on the said run, for conductors, flagmen, and brakemen, were bulletined on or about June 4, 1944, by Bulletin No. TM-46, a copy of which is attached hereto and made a part hereof as Exhibit 2, and that the said bulletin sets forth the assignments for conductors on said run herein referred to.

7. Answering Article 7, defendant shows that on numerous occasions since said run was bulletined and assigned, contrary to said bulletin and assignment, as well as the terms and conditions of the said agreement Exhibit "A" and the established practices on the lines of the Southern Railway Company, the conductors on said run have been required by plaintiff to make, in addition to the assigned run designated in Exhibit 2 hereof, a side or turn-around run from Pregnall, South

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Carolina, to the plant of the Aneur Corporation, near Harleyville, South Carolina, a distance of approximately $6\frac{3}{4}$ miles from Pregnall, South Carolina, and there perform certain switching operations and return to Pregnall, South Carolina, and resume said assigned run. Defendant states that the said side or turn-around runs are not a part of the assignments of said conductors and are not made on the track of the Southern Railway Company between Charleston, South Carolina, and Branchville, South Carolina, but are made on a branch or connecting track owned by the Defense Plant Corporation, which track connects with the plaintiff's track on said run at Pregnall, South Carolina. The defendant denies the remaining allegations of said Article.

8. Defendant denies the allegations of Article 8.

9. Defendant denies the allegations of Article 9 except that it admits the present rate of compensation for such conductors and the amount of overtime are the amounts set forth in said Article, and the defendant makes reference to the original agreement for the construction thereof.

10. Answering Article 10, the defendant admits that the conductors on plaintiff's trains between Charleston, South Carolina, and Branchville, South Carolina, on the assignment set forth in Exhibit 2 hereof, are on a straightaway run as referred to in Article 5 (a) of said agreement Exhibit "A", and are in local freight service, and that their compensation for such service is fixed under the terms and provisions of the schedule of wages of said written agreement, as amended, and as interpreted and applied in established practice on plaintiff's lines. Defendant denies the remaining allegations of Article 10.

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11. Answering Article 11, defendant admits that the Local Chairman of Adjustment of the Order of Railway Conductors and the General Committee of Adjustment and the General Chairman thereof have demanded and still demand additional pay for the conductors involved for additional services under the terms of the agreement or contract Exhibit "A" and the established practices on the lines of the Southern Railway Company, and filed claims therefor with the proper representatives of the plaintiff, but defendant denies that plaintiff has compensated said conductors in accordance with the terms of the contract and the established practice on such lines, and denies the remaining allegations of said Article.

12. Answering Article 12, defendant admits that the clause quoted from said contract is correctly quoted, but defendant makes reference to the whole of said contract and denies the remaining allegations of said Article.

13. Answering Article 13, defendant admits that the said claims of the conductors on the run referred to in Exhibit 2 hereof have been denied by plaintiff's Assistant Personnel Manager, but alleges that the General Committee of Adjustment and its General Chairman on plaintiff's lines are continuing to process said claims and seek adjustment thereof in accord with the usual practice for the adjustment of claims. Defendant denies any knowledge or information, sufficient to form a belief, as to the remaining allegations of Article 13, and denies that the costs to the plaintiff of complying with the terms of the contract between plaintiff and defendant furnish the legal or just criterion for the construction of said contract.

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14. Defendant denies the allegations of Article 14 and shows further that it is informed and believes that plaintiff has taken no steps to exhaust its remedies under the Railway Labor Act, but on the contrary, is seeking a means to avoid resort to the procedure intended by Congress to secure a hearing and determination of said claims.

15. Defendant denies the allegations of Article 15.

16. Defendant denies each and every allegation of the complaint not hereinbefore specifically admitted or denied.

17. Further answering said complaint, and for a further and complete defense thereto, defendant shows and alleges that the said claims have been and are being handled by the General Committee of Adjustment of the Order of Railway Conductors and its General Chairman in accord with the provisions of Section 3 (i) of the Railway Labor Act in the usual manner as a condition precedent to filing said claims with the National Railroad Adjustment Board for decision and determination. Defendant, in accord with the usual practice for adjustment of such claims, alleges that the Local Chairman of the Local Committee of Adjustment attempted to obtain an adjustment of said claims with the plaintiff's Superintendent on said run, and upon an adjustment being declined by the said Superintendent, the Local Chairman referred the said claims to the General Chairman of the General Committee of Adjustment of the Order of Railway Conductors on the lines of plaintiff for handling; that said General Chairman of said General Committee has and is now seeking to adjust said claims with the proper representatives of the plaintiff, and has notified the said representatives of plaintiff that upon completion of

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said negotiations on said claims, and failing an adjustment thereof, that said claims will be submitted to the National Railroad Adjustment Board for hearing and determination. Defendant denies the right of this plaintiff, at this time, to withdraw said claims from the course of their progress to the National Railroad Adjustment Board and to have a judicial determination of said claims, thereby disregarding the provision of the Railway Labor Act and the remedies provided therein for the handling, adjustment, and determination of disputes between carriers and the employees growing out of the interpretation or application of collective bargaining agreements, concerning rates of pay, rules, or working conditions, and to attempt to sidestep and bypass said Railway Labor Act and to deny to the duly accredited bargaining agent and representative of the class and craft of conductors on plaintiff's lines, and the individual conductors involved, the benefits and provisions of said Act and the right to submit and obtain a hearing and determination of said claims by the National Railroad Adjustment Board or otherwise proceed under the provisions of said Act.

18. Further answering said complaint and for a further and complete defense thereto, defendant shows and alleges that the mere fact alone, that a dispute exists between plaintiff and the Local Committee of Adjustment of the Order of Railway Conductors and its local chairman, and the General Committee of Adjustment of the Order of Railway Conductors and its General Chairman with reference to the interpretation and application of any provision or provisions of said contract, Exhibit "A", does not in and of itself give plaintiff the right to seek and secure a declaratory

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judgment with reference to such rule or rules as to which a dispute may exist, as said dispute continues at all times, subject to the further processes of collective bargaining as well as the other adjustment procedure afforded by the terms and provisions of the Railway Labor Act.

That Congress by the provisions of the Railway Labor Act created and set up an adjustment machinery for the settlement of disputes of the character alleged in plaintiff's complaint not resolved by the processes of collective bargaining, including without being limited thereto, adjustment boards under the provisions of Section 3 of said Act; that said adjustment board is composed of representatives of carriers and employees skilled and trained by long practical experience in the interpretation and application of collective bargaining agreements between carriers and railroad employees, not only with respect to such agreements with the craft and class of conductors, but other crafts and classes as well, and that the First Division of the said Adjustment Board has jurisdiction to hear and determine the controversy alleged in plaintiff's complaint upon application of either plaintiff or the representative of the employees, and the defendant alleges that by reason of all of the matters hereinbefore set forth and alleged in its answer, the subject-matter of said alleged dispute is not one which the court in the exercise of its sound judgment and discretion ought to hear, consider or attempt to determine under a declaratory judgment procedure and that plaintiff has other full and adequate remedies specially designed and created by Congress.

Defendant further states and alleges that this court in the exercise of its sound discretion and as a matter

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of equity, should and ought not to proceed, hear and take evidence and attempt to grant and give a declaratory judgment with respect to the interpretation of the provisions of said contract, Exhibit "A", under the circumstances alleged and set forth in plaintiff's complaint, in that so to do would thwart and destroy the purposes sought to be attained by Congress in setting up the adjustment machinery provided and as set forth in the Railway Labor Act, in that said matters of grievances and differences arising from the interpretation and application of rules and rates of pay arise and exist from day to day by and between not only the class and craft of conductors and carriers upon each line of railroad and operating division thereof but among all of the various classes and crafts of railroad employees with plaintiff carrier and other carriers, and in the event controversies of said character and type are adjudged and determined to be the proper and appropriate subject for a declaratory judgment, this court and other courts will be flooded and besieged from day to day with innumerable controversies and the effect of seeking to determine controversies of said character by the means of a declaratory judgment will be the effect of impairing, if not destroying, attempts in good faith to compose, settle and adjust said grievances by the process of collective bargaining as by the procedure devised and created by Congress for said purpose.

19. Further answering said complaint and for a further and complete defense thereto defendant shows and alleges that this court in the exercise of the sound discretion invested in it should and ought not consider, take evidence and attempt to determine the dispute alleged in plaintiff's complaint under a declaratory

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judgment procedure in that by so doing and in the event a precedent would be thereby established, that such controversies were properly to be made the subject of an action for declaratory judgment by any party interested therein, each and all of such disputes would require the taking of evidence from witnesses and appearances in court, not only imposing a tremendous financial burden upon the employees or their representatives in the defense of such suits in the matter of payment of witness fees, court costs and attorney fees, but would, in addition, require many and numerous employees to be away from their work for a period of days, lose their compensation and incur other expense, and in addition thereto should this court determine and adjudge that the declaratory judgment procedure is proper for the determination of disputes arising out of rules, wage and working conditions and interpretations of collective bargaining contract, such interpretations would of necessity require testimony of employee witnesses as to established practice and to hear and determine such controversies under a declaratory judgment procedure in the many hundreds and thousands of cases that would arise and require employees to be away from their work to protect and preserve their rights and interests would tend to interrupt, interfere and impair commerce.

20. Further answering said complaint, and for further and complete defense thereto, defendant would further show and allege that any declaratory judgment that may be entered in this cause would not necessarily be binding as between the plaintiff and the individual conductors operating said runs described in plaintiff's complaint, and asserting and claiming under the collective contract, the established practice and

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interpretations thereon, the right to additional compensation and moneys based upon the claims filed or to be filed, or other rights and claims that might be asserted and claimed by said individual conductors. 97

Wherefore, defendant prays that the complaint be dismissed with costs.

V. C. SHUTTLEWORTH,
MITCHELL & HORLBECK,

Attorneys for Defendant.

(Verified.)

EXHIBIT 2

This Exhibit, attached to the answer, is the same Bulletin No. TM—46, which is printed post as Defendant's Exhibit "J".

NOTICE OF GROUNDS OF ORAL DEMURRER

To Messrs. Frank G. Tompkins, J. M. Cohen, L. M. Abbott and Barnwell & Whaley, Attorneys for Plaintiff:

Please take notice that upon the call of the above entitled Cause for trial, or at the hearing of this oral Demurrer if the same shall be heard before the time of trial, the defendant will demur orally to the Complaint herein and object to and move to dismiss the same on the following grounds: 100

1. That the court is without jurisdiction of the subject of the action in that it affirmatively appears that the action is one involving a dispute or controversy between plaintiff, an interstate carrier by rail, and defendant, the duly authorized representative of the craft and class of conductors employed on plaintiff's lines, concerning the application and interpretation of 103

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101 a collective bargaining agreement between plaintiff and defendant in regard to rates of pay, rules and working conditions and that the alleged dispute or controversy is one wholly within the terms and provisions of the Railway Labor Act and that this court lacks jurisdiction to hear and determine the said dispute or controversy for the following reasons to wit:

100 (a) Congress, in the exercise of its constitutional power over interstate commerce, has provided by the Railway Labor Act the sole and exclusive means and procedure for the adjustment, settlement, and determination of disputes and controversies of the character alleged herein and such disputes and controversies have been removed from the judicial control or determination of the courts of the several states by said Act.

(b) The Railway Labor Act provides in part as follows:

100 "First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

104 "Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the

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carrier or carriers and by the employees thereof interested in the dispute." 104

"Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. * * *

This court is without jurisdiction to hear and determine the dispute or controversy alleged herein and thereby to deprive this defendant and the craft and class of conductors represented by it of the rights and benefits provided by the Railway Labor Act and to provide a means for this plaintiff to evade the mandatory duties and obligations imposed on it under said Act and thereby nullify the terms and provisions of said Act and particularly the provisions of said Act above set forth. 105

(c) The Railway Labor Act further provides in part as follows:

"Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this chapter, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them." 107

This court is without jurisdiction to hear and decide this controversy and provide a means whereby the 108

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craft and class of conductors represented by defendant and the individual members thereof will be deprived of the benefits of the Railway Labor Act and particularly those set out in the provisions of said Act above set forth, and whereby the plaintiff will be enabled to evade the duties and obligations imposed on it by the said Act and particularly by the provisions of said Act above set forth.

(d) Congress, in enacting the Railway Labor Act in Section 3 thereof, has provided the sole and exclusive means and procedure for the adjustment and determination of disputes and controversies of the character alleged herein, and particularly of disputes between interstate rail carriers such as plaintiff and the authorized representatives of the employees of such carriers concerning the interpretation and application of agreements regarding rates of pay, rules and working conditions.

2. It appears on the face of the complaint that the complaint fails to state facts sufficient to constitute a cause of action in that:

(a) Congress, in the exercise of its constitutional power over interstate commerce, has provided by the Railway Labor Act the sole and exclusive means and procedure for the adjustment, settlement, and determination of disputes and controversies of the character alleged herein and such disputes and controversies have been removed from the judicial control or determination of the courts of the several states by said Act.

(b) The plaintiff has failed to allege and plead that it has fully complied with the duties and obligations imposed on it by the Railway Labor Act and that it has exhausted the remedies and procedure provided by

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said Act for the adjustment, settlement, and determination of the disputes and controversies of the character alleged herein.

(c) It affirmatively appears from the facts alleged that this court ought not, in the exercise of its sound discretion and as a matter of equity, attempt to hear and determine disputes and controversies of the character alleged herein under the circumstances alleged and set forth in plaintiff's complaint, in that so to do will thwart and destroy the objects and purposes sought to be obtained by Congress in the enactment of the Railway Labor Act, will have the effect of impairing, if not destroying, attempts in good faith to compose, settle and adjust such disputes and controversies by the process of collective bargaining, will constitute an interference with interstate commerce and the said complaint does not allege facts appropriate for declaratory relief.

Wherefore, defendant prays that the complaint be dismissed at plaintiff's costs.

MITCHELL & HORLBECK,

ELLIOTT, SHUTTLEWORTH &

INGERSOLL,

Attorneys for Defendant.

Charleston, S. C.,

December 26, 1945.

ORDER SUSTAINING DEMURRER

During the time that this matter has been pending before me I have given it careful study and I have reached the conclusion that the demurrer will have to be sustained on two grounds:

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1. That the plaintiff has an adequate remedy under the Railway Labor Act. In the case of *Washington Terminal Company v. Boswell*, 124 Federal Reporter, 2nd Series, page 235, the Court of Appeals of the District of Columbia held that this Act gives a remedy that meets all constitutional requirements, and that decision was affirmed by the United States Supreme Court. Now, our Supreme Court has construed our declaratory judgment act as enlarging the powers of our Court of Equity. It is elementary, under our procedure, that if there is any other remedy then a court of equity has no jurisdiction, and I can't escape the conclusion here that since the Federal courts have held that there is another remedy that is open to the parties that a Court of Equity here has no jurisdiction. Now, it would be different under the Federal Court rule. The Federal rule, as I recall rule No. 57, provides that even though another remedy exists that is no ground for a court refusing to entertain a suit for declaratory judgment. Consequently, under that rule the Federal Court in the case of *Washington Terminal Company v. Boswell*, *supra*, correctly held that in the Federal Court, the Courts of Equity and the Administrative remedy under the Railway Labor Act are concurrent remedies.

2. I think the demurrer would have to be sustained for the reason that even though this Court had concurrent jurisdiction, like the Federal Court, I think it should exercise its discretion as the United States Supreme Court held in the *Order of Railway Conductors v. Pitney*, 66 Supreme Court Reporter, page 322. While the case before me involves interpretation of a contract, it is in a class by itself and a Court can not look upon a dispute between an employer and its employees

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in the same light as other contractual matters. It is very clearly pointed out in the *Pitney* case that there is more to a case of this kind than merely a construction of the contract, and even if a Court should decide it, I don't think it would mean it would be necessarily settled. I think, under those circumstances, the Court should leave such matters to a decision of these Boards which have been constituted to settle such questions. If those Boards are so congested that they can not give proper relief, I think appeal ought to be made to Congress for relief along that line. I consider the *Pitney* case controlling here. For these reasons I sustain the demurrer.

STEVE C. GRIFFITH,
Presiding Judge.

Charleston, S. C.,

April 22nd, 1946.

DECISION OF SUPREME COURT OF SOUTH
CAROLINA AND REMITTITUR

Filed February 13, 1947, 41 S. E. (2d) 774, 210 S. C.,

121

Fishburne, A.J.: This action was instituted against the defendant by Southern Railway Company in July, 1945 under the declaratory judgment Act of this state, Code Section 660, for the purpose of obtaining a construction of a written contract between the plaintiff and the defendant, Order of Railway Conductors of America. The question presented by the complaint is whether certain industrial switching movements at the plant of the Aneur Corporation at Pregnall, South Carolina, an intermediate point on plaintiff's railroad line between Charleston and Branchville, are part of

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the service trips of conductors in charge of local freight trains between Charleston and Branchville; or whether such conductors are entitled to an additional day's pay for performing switching operations at the plant of the Aneur Corporation, separate and apart from and in addition to the pay for their service trips from Charleston to Branchville and return.

Plaintiff appeals from the judgment of dismissal entered upon sustaining the defendant's oral demurrer to the complaint.

As will be seen, the action is one involving a dispute or controversy between the plaintiff, an interstate carrier by rail, and the defendant, the duly authorized representative of the craft and class of conductors employed on plaintiff's railroad, concerning the interpretation of a collective bargaining agreement between plaintiff and defendant in regard to rates of pay, rules, and working conditions.

The complaint alleges that the defendant is an unincorporated association engaged in union activities in Charleston County and is the duly authorized representative of and bargaining agent for the conductors employed by the plaintiff in the operation of the freight trains mentioned in the complaint in all matters involved in and arising under a written contract, attached as an exhibit, entitled "Schedule of Wages and Rules and Regulations for Conductors." That an actual controversy exists between plaintiff and defendant as to the proper construction of this contract regarding the work of conductors represented by defendant on certain local freight trains (known as "local freight service") operated between Charleston, South Carolina and Branchville, South Carolina, with reference to industry switching service performed at Preg-

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next, a point on this line of railroad; that the distance between Charleston and Branchville is approximately sixty-three miles, the average time consumed on the run is six and one-half hours, and the average time of duty of conductors each day is approximately eight hours and thirty-nine minutes, the conductors going on duty at Charleston or at Branchville, as the case may be, and being relieved from duty at the end of each run.

That as a part of the regular service trip of the conductors in charge of the freight trains on the run, they perform such switching as is necessary over the industrial tracks of the various industries served by plaintiff along this line of railroad, and have been doing so continuously at least since 1910, without demanding or being paid extra compensation; that conductors in charge of westbound local freight trains are instructed to perform such industry switching as may be necessary at the plant of the Aneur Corporation over industry tracks owned by this corporation, such industry switching consisting of the westbound local freight trains taking cars whose destination is the plant of the Aneur Corporation, to the plant, placing the cars on a designated track or tracks, and then picking up and hauling from the plant to plaintiff's main line any cars destined to other points. It is alleged that such switching movements are similar to those performed on innumerable other industry tracks which join plaintiff's railroad line and have always been an accepted and agreed practice by the conductors of plaintiff's local freight trains as a part of their service trips and have been performed as pursuant to the terms of the said contract.

The complaint further alleges that the above mentioned contract, in Articles 5 (a) and 7, establishes the

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188 compensation to be paid the conductors and that the base rate of pay for these conductors in effect at the time of the commencement of the suit (the distance of the run being less than one hundred miles), was \$9.10 per day for eight hours service or less, and that if service exceeded eight hours they would receive additional pay for overtime on a minute basis at the rate of \$1.70 an hour.

191 The complaint further alleged that although the conductors of plaintiff have always performed the service of switching on industrial tracks as an incident to and part of the road trip, and that notwithstanding they have always been paid on the basis of a minimum day and overtime, if earned, in accordance with the provisions of the contract, the defendant as their duly authorized representative and bargaining agent is now claiming in their behalf, and has demanded for the industry switching service at Pregnall, payment of additional compensation at the rate of a minimum day's pay, or \$9.10 per day, separate and apart from and in addition to their regular pay of \$9.10 for the local freight service.

196 That starting on or about October 10, 1944, the defendant has filed claims with the plaintiff for the additional day's pay for these conductors, claiming that the performance of the industry switching at the plant of the Ancor Corporation entitled them to an additional day's pay, separate and apart from, and in addition to their pay for the local freight service trip between Charleston and Branchville, which claims the plaintiff alleges are not only in violation of the sections of the contract referred to above, but are contrary to the provisions of the contract which provide

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that it does not alter former accepted and agreed to practices, working conditions and interpretations. 187

The complaint then sets out the heavy additional expenses which would be involved in the payment of defendant's claims; the formal rejection of the claims, so that an actual controversy between plaintiff and defendant exists; and alleges that it is without adequate remedy at law or in equity other than the present suit for a declaratory judgment, this being the only judicial remedy available to plaintiff in order to avoid irreparable injury and damage.

The prayer of the complaint is for a declaratory judgment or decree adjudging that under the provisions of the contract between the parties, the industrial switching movements at the plant of the Ancor Corporation at Pregnall are a part of the local freight service trips of the conductors for which they are entitled to receive only the applicable and governing rate of compensation as set out in the complaint, and that they are not entitled to receive an additional day's pay separate and apart from the pay for the service trip from Charleston to Branchville. 188

The respondent contends under the first ground stated in the demurrer, that the issue involves a labor dispute concerning the interpretation of a collective bargaining agreement which is wholly within the terms of the Railway Labor Act; that this Act is the sole and exclusive means of procedure for settling such disputes, and that consequently the dispute has been removed from the judicial control or determination of the courts of this state. (40 U. S. Stat., 1185, Chap. 691, 45 U. S. C. A., Secs. 151-188, Pages 986-1056.) 189

In sustaining the demurrer, the circuit court held that appellant has an adequate remedy under the Rail-

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141 way Labor Act, and that there being another remedy a court of equity has no jurisdiction. And, further, that even if the court has concurrent jurisdiction, it should in the exercise of its discretion, refuse to assume jurisdiction. In opposing this holding of the court, appellant assigns error because the Federal Railway Labor Act is not exclusive and does not in fact provide a remedy which defeats the jurisdiction of the courts of South Carolina in a case of this kind.

142 This Act established a Board to be known as the National Railroad Adjustment Board, and provides that one of the divisions of this Board should have jurisdiction over wage disputes. In support of its contention, the respondent points especially to Section 153 (i), which as amended in 1934, provides that disputes growing out of grievances or out of the interpretation or application of agreements, "shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party, to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

143 The respondent argues that under this provision the National Railroad Adjustment Board is vested with exclusive jurisdiction over disputes between conductors and the carrier concerning rates of pay and rules of working conditions; or at least that the dispute must first be referred to the Board and the remedies there exhausted before resort may be had to the courts.

144 This contention in our opinion is untenable. The present action is for a declaration of rights under a

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written contract, and does not involve or arise out of any order of the National Railroad Adjustment Board. In fact there is nothing in the complaint to suggest that the dispute has ever been referred or mediation invited under the provisions of the Railway Labor Act and the above-quoted provisions do not purport in such case to prevent recourse to the courts in the first instance.

In the recent decision of *Illinois Central R. Co. v. Moore*, 5 Cir., 112 F. (2d), 959, it was said:

"The plea that suit may not be filed without recourse to the Adjustment Board is without merit. The Adjustment Board may settle the disputes of the individual employee as well as those of the group, 45 U. S. C. A., Sec. 153 (i); as may the Mediation Board, 45 U. S. C. A., Sec. 155 (l). The first cited section says that a dispute 'shall be handled in the usual manner up to and including the chief operating officer of the carrier,' and then 'it may be referred' to the Adjustment Board. The permission to go to the Adjustment Board does not exclude direct recourse to the courts. See *Bell v. Western Railway of Alabama*, 228 Ala., 328, 153 So., 434. Decisions to the effect that a failure to invoke administrative remedies before the Interstate Commerce Commissions or other federal administrative Boards precluded or rendered premature a resort to the courts were based upon statutes which by express terms or necessary implication gave to the administrative board exclusive jurisdiction or made the exhaustion of administrative remedies a condition precedent to judicial action. See *United States v. Illinois Central R. Co.*, 291 U. S., 457, 54 S. Ct., 471 78 L. Ed.

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909; *Myers v. Bethlehem Shipbuilding Corporation*, 303 U. S., 41, 58 S. Ct., 459, 82 L. Ed., 638; 51 Harvard Law Review, 1254, 1260, where many of the cases on the subject are discussed."

That the Railway Labor Act did not oust the courts of jurisdiction to interpret an agreement between a carrier and its employees, even where the dispute with respect to the agreement was one which, under the Act, might have been, but was not, submitted to the National Railroad Adjustment Board, was clearly determined in *Moore v. Illinois Central R. Co.*, 312 U. S., 630, 61 S. Ct., 754, where it is stated:

"... But we find nothing in the Act which purports to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in court. . . . It is to be noted that the section pointed out, Sec. 153 (i), as amended in 1934, provides no more than that disputes 'may be referred . . . to the . . . Adjustment Board . . .'. It is significant that the comparable section of the 1926 Railway Labor Act (44 Stat. at L. 577, 578, Chap. 347) had, before the 1934 amendment, provided that upon failure of the parties to reach an adjustment a 'dispute shall be referred to the designated Adjustment Board by the parties, or by either party. . . .'. This difference in language, substituting 'may' for 'shall', was not, we think, an indication of a change in policy, but was instead a clarification of the law's original purpose. For neither the original 1926 Act, nor the Act as amended in 1934, indicates that the machinery provided for settling disputes was based on a

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philosophy of legal compulsion. On the contrary, the legislative history of the Railway Labor Act shows a consistent purpose on the part of Congress to establish and maintain a system for peaceful adjustment and mediation voluntary in its nature. The District Court and the Circuit Court of Appeals properly decided that petitioner was not required by the Railway Labor Act to seek adjustment of his controversy with the railroad as a prerequisite to suit for wrongful discharge
• • •

The holding in *Moore v. Illinois Central R. Co.*, 312 U. S., 630; 61 S. Ct., 754, was followed in *Washington Terminal Company v. Boswell*, 124 F. (2d), 235, which was affirmed *per curiam* by an equally divided court, 319 U. S., 732, 63 S. Ct., 1430, where it was stated:

“The foregoing considerations are reinforced by the fact that the carrier, under the decision in *Moore v. Illinois Central R. R.*, *supra*, can bring its suit on the contract, independently of the statute, prior to the time when the dispute is submitted to the Board. Until then, at least, it has its election to pursue the exclusively judicial remedy or to follow the administrative and judicial one provided by the Railway Labor Act • • •”

In view of these decisions, it is our opinion that the Congress intended that controversies of the character set forth in this case may be adjusted in either of two ways: First, under the authority of the Act by submitting the dispute to the National Railroad Adjustment Board; or, second, by exercising the common law rights of any party to bring an action to construe a contract and have his rights declared. There is concurrent jurisdiction of the subject-matter of a suit of

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187 this kind, either by a court of competent jurisdiction or by the National Railroad Adjustment Board.

The briefs filed by the appellant and the respondent are thorough and extensive, and exhaustively discuss this issue, with the citation of many cases. On this question of jurisdiction, the respondent discusses at length the necessity and advisability of recourse by appellant to the Railway Act and the effect of the failure to proceed under it on the administration of the Act, and strong reliance is had in support of this argument on the recent case of *Order of Railway Conductors of America v. Pitney* (January 14, 1946), 326 U. S., 561, 66 S. Ct., 322. Respondent contends that it was definitely decided in the *Pitney* case that in the exercise of equitable discretion a court should refuse to interfere in disputes properly cognizable by the Adjustment Board. It is urged that the decision in the *Pitney* case overruled in effect the case of *Moore v. Illinois Central R. Co.*, 312 U. S., 630. But we are not convinced that it has this effect.

188 The *Pitney* case involved primarily a suit for an injunction, and was complicated by the dual function of the court—first, as a court required to direct the receivers how to conduct the business of the railroad; and, second, as a court of equity required to determine if an injunction should issue to enjoin the receivers from violating Section 6 of the Railway Labor Act. The case was further complicated by a jurisdictional dispute requiring the interpretation of two collective bargaining agreements, which it was alleged, overlapped.

189 None of these conflicting features is present in the case now under consideration. In this case there is only one defendant, one contract, and one set of facts requiring the attention of the court in constraining the

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agreement and disposing of the dispute. It might further be noted that the Supreme Court in the *Pitney* case did not hold that the Federal Court did not have jurisdiction. It merely held that in consideration of the complicated features of the case, the court should retain jurisdiction to stay action on the prayer for injunction in order to permit the parties to first have the two contracts interpreted by the administrative procedure provided in the Railway Labor Act. Nowhere in the opinion of the court do we find any reference made to the case of *Moore v. Illinois Central R. Co.*, *supra*. If it had been the intention of the court to overrule the *Moore* case which was decided in 1941, we think this would have been done in specific language.

Our declaratory judgment Act (Code Section 660) reads as follows:

"No action or proceeding in any court of record wherein the construction of a deed, a will or written contract is sought or involved shall be open to the objection that a merely declaratory judgment, decree or order is sought, and the court may make binding declarations of the rights of parties to such action or proceedings under such instruments whether other relief is or could be claimed or not."

As a sanction for the maintenance of this action and for the relief demanded, the appellant comes squarely within the provisions of this section of the Code.

It is generally held that the jurisdiction to render a declaratory judgment is discretionary, and should be exercised with great care, and with due regard to all the circumstances of the case. Annotations, 12 A. L. R., 66, 87 A. L. R., 1212. And it is clear under our Code provision (Section 660) that the legislature intended to confer discretionary powers upon the courts of this

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state by using the expression "may make binding declarations." f

146 The courts are not entirely agreed as to the effect of the existence of another remedy upon the right to a declaratory judgment. Declaratory Judgment Acts are not in general limited by their express terms to cases where there is no other adequate remedy available, but, on the contrary, are expressly made applicable, like ours, without regard to other relief claimed. When there exists a genuine controversy, as the pleadings in this case admit, requiring a judicial determination, the court is not bound to refuse to exercise its power to declare rights and other legal relations merely because there is another remedy available. 16 Am. Jur., Sec. 13, Page 286; *Woolard v. Schaffer Stores Co.*, 272 N. Y., 304, 273 N. Y., 527, 5 N. E. (2d), 829, 7 N. E. (2d), 676, 109 A. L. R., 1262.

147 A complaint for declaratory relief is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties under a contract, and requests that these rights and duties be adjudged by the court. The allegations of the complaint leave no doubt of the existence of an actual controversy between the parties.

148 That another remedy may exist, and that other relief may be available to the plaintiff are factors to be considered by the court. However, before declaratory relief may be denied, in the discretion of the court, on the ground of the existence of other remedies, it must clearly appear that the asserted cumulative remedies are not only available to the plaintiff, but that they are speedy and adequate, or as well suited to the plaintiff's needs as declaratory relief.

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The complaint fully sets out the facts upon which the case is based. In passing upon the demurrer, the allegations of the complaint and all intendments must be taken to be true, and these allegations fix bounds beyond which we cannot go. 100

It appears that all of the necessary parties are before the court; the situation giving rise to the controversy is local to South Carolina, and the witnesses are all available in this state. Under the facts and circumstances disclosed here we see no sound reason why jurisdiction, having been acquired by our courts, should not be retained. Certainly under the facts of this case, no other remedy exists under the laws of this state except that which is now claimed by the plaintiff. 170 The case analogous to this is that of *Delaware, Lackawanna and Western R. Co. v. Slocum*, 60 N. Y. S. (2d), 313. In this case, after a hearing upon the merits, the court will exercise its discretion as to whether or not it will make a binding declaration.

We are merely holding here that the complaint alleged a cause of action for declaratory relief; and for the reasons stated the circuit court of Charleston County has jurisdiction to entertain the action, and the lower court erred in sustaining the demurrer. 171

Judgment reversed.

Baker, C.J., Stukes, Taylor and Oxner, JJ., concur.

REMITTITUR

Judgment reversed.

(Seal of the Supreme Court of South Carolina) Attest;
J. B. Westbrook, Clerk.

Remitted to Circuit Court for Charleston County,
March 12, 1947. 172

Filed Mar. 14, 1947. W. L. Fleming, C.C.C.P. & G.S.

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RESERVATION OF OBJECTIONS

172 Now comes the Defendant above named and before entering upon the Trial of this cause, the Defendant desires to place upon record before the Court full reservation of its jurisdictional and other objections based upon the Railway Labor Act.

The Supreme Court of South Carolina has held in this case that the Circuit Court of Charleston County has jurisdiction but that

174 "after a hearing upon the merits, the Court will exercise its discretion as to whether or not it will make a binding declaration. We are merely holding here that the complaint alleged a cause of action for declaratory relief; and for the reasons stated the Circuit Court of Charleston County has jurisdiction to entertain the action and the lower Court erred in sustaining the demurrer."

Southern Railway Co. v. Order of Railway Conductors of America, 41 S. E. (2d), 774 at 779, 210 S. C., 121.

176 That decision not being a final judgment, no appeal or application for Certiorari could be made at this time or heretofore to the Supreme Court of the United States. Therefore, Defendant cannot do otherwise than defend the cause with full reservation of its jurisdictional objections and the questions raised by it in the record under or pertaining to the Railway Labor Act of Congress. Defendant can do no more at this point than call to the attention of the Court Defendant's position, which it desires and prays to be permitted to preserve throughout this trial, to the effect that the decision of the Supreme Court of South Carolina in this Cause is, in the opinion of Defendant's Counsel,

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not in accord with the decision of the Supreme Court of the United States in *Order of Railway Conductors v. Pitney*, 326 U. S., 561, 66 S. Ct., 322, and other decisions of that Court construing and applying the Railway Labor Act, and to preserve for Defendant the benefit of the possibility that, in the event the Supreme Court of the United States should grant Certiorari from any final judgment herein, the Supreme Court of the United States may adhere to its decision in the *Pitney case*, *supra*, and its other decisions as to the Railway Labor Act, and may not follow or hold as sound or substantial the grounds upon which the Supreme Court of the State of South Carolina in this case has differentiated and distinguished the *Pitney case*.

Respectfully submitted,

ELLIOTT, SHUTTLEWORTH &
INGERSOLL,

MITCHELL & HORLBECK,
Attorneys for Defendant.

Charleston, S. C.,

June 23, 1947.

NOTICE OF MOTION TO AMEND ANSWER

To Messrs. Barnwell & Whaley, Frank G. Tompkins,
Sidney S. Alderman and W. S. MacGill, At-
torneys for Plaintiff:

Please take notice that, expressly reserving and without waiving all objections to the jurisdiction of the Court to render a declaratory judgment in this Action, we will move before Honorable William H. Grimbball, Circuit Judge, at the County Court House in Charle-

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ton, S. C. on Monday, June 23rd, 1947, at Ten o'clock
in the forenoon or as soon thereafter as counsel can
be heard for an order amending the Answer of the
defendant, whether by way of strict amendment or
supplemental answer as the Court may determine, by
striking out Article 17 and substituting and inserting
in lieu thereof as Article 17 the language set forth in
the proposed form of Order amending Answer, copies
whereof were served upon you on the 5th day of April,
1946, and by the addition after Article 20 of said
Answer the language set forth as Article 21 in said
proposed form of Order, and otherwise, all as more
particularly set forth in said proposed Order, Motion
for which amendment was by agreement of counsel
noticed for hearing before Judge Griffith upon the first
trial on Monday, April 15th, 1946, but was never
passed upon by Judge Griffith by reason of his having
first heard and sustained the oral Demurer.

ELLIOTT, SHUTTLEWORTH &
INGERSOLL,

MITCHELL & HORLBE &,

Attorneys for Defendant.

Charleston, S. C.,

June 12, 1947.

ORDER AMENDING ANSWER

(As proposed in Motion)

Due notice of motion of application for this Order
having been served upon plaintiff's attorneys, and the
matter coming on to be heard, it is thereupon and on
motion of attorneys for defendant, ordered as follows:

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1. That the answer of defendant filed herein be and the same is hereby amended by striking out Article 17 of said answer beginning on page 6 and substituting and inserting in lieu thereof the following:

"17. Further answering said complaint, and for a further and complete defense thereto, defendant shows and alleges that the said claims have been and are being handled by the General Committee of Adjustment of the Order of Railway Conductors and its General Chairman in accord with the provisions of 3 (i) of the Railway Labor Act in the usual manner as a condition precedent to filing said claims with the National Railroad Adjustment Board for decision and determination. Defendant alleges that pursuant to the provisions of the Railway Labor Act and the interpretations thereof by the Supreme Court of the United States, the defendant has submitted this dispute and the claims involved herein to the said Adjustment Board and that the said submission has been docketed and filed by the Adjustment Board and is presently pending before it for hearing and determination. Defendant denies the right of this plaintiff, at this time, to interfere with or withdraw said claims from the course of their progress before the National Railroad Adjustment Board and to have a judicial determination of said dispute and claims involved therein, thereby disregarding the provisions of the Railway Labor Act and the remedies provided therein for the handling, adjustment and determination of disputes between carriers and their employees growing out of the interpretation and application of collective bargaining agreements concerning rates of pay,

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rules or working conditions and to attempt to side-step and bypass said Railway Labor Act and to deny to the duly accredited bargaining agent and representative of the class and craft of conductors on plaintiff's lines and the individual conductors involved, the benefits and provisions of said Act and the right to submit and obtain a hearing and determination of said claims by the National Railroad Adjustment Board or otherwise proceed under the provisions of said Act. Defendant further alleges that in the event that the National Railway Adjustment Board, on hearing and determination of this dispute, enters an award or awards in favor of this defendant and the individual conductors involved herein, this defendant or the individual conductors benefited by the award will be entitled to make said award effective by the remedies provided in the Railway Labor Act and particularly the provisions of Sections 3 (o) and 3 (p), and defendant denies the right of this plaintiff to secure a judicial determination of said dispute in this court for the purpose of nullifying provisions of said Act and particularly 3 (o) and 3 (p) thereof and denies further the right of this plaintiff by securing a judicial determination of this dispute to prevent this defendant from pursuing the remedies provided under the Railway Labor Act and particularly the provisions in Section 3 (o) and 3 (p) thereof."

2. That the Answer of defendant filed herein be and the same is hereby amended by the addition after Article 20 of said Answer, of the following Article 21.

"21. Further answering said complaint and for a further and complete defense thereto defendant

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shows and alleges that disputes between this plaintiff and this defendant involving the interpretation and application of agreements concerning rates of pay, rules, or working conditions are subject to the provisions of the Railway Labor Act providing for the prompt and orderly settlement of such disputes by the means and procedure contained therein, and defendant denies the right of this plaintiff to evade the provisions of said Act, and the duties and obligations imposed thereunder and the rights of this defendant granted therein and denies the right of this plaintiff to interfere with and defeat the settlement of this dispute by the processes of collective bargaining and the further processes provided in said Act by resort to judicial proceedings for the determination of said dispute. Defendant alleges that Congress, in enacting the Railway Labor Act, foreclosed resort to the courts for the determination of disputes between rail carriers and their employees involving the application and interpretation of agreements covering rates of pay, rules and working conditions and denies that this plaintiff has alleged a justiciable controversy within the jurisdiction of this court to hear and determine and declare the rights of the parties herein."

3. It is further ordered that it shall be unnecessary to rewrite and re-serve the whole complaint, but in lieu thereof a copy of this Order shall be served upon plaintiff's attorneys, upon which the said answer shall

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be deemed to stand as amended by the inclusion therein of Articles 17 and 21 as above set forth.

Judge.

Charleston, South Carolina,

_____, 1946.

PROCEEDINGS

Charleston, S. C., June 23, 1947.

Before HON. W. H. GRIMBALL, Circuit Judge.

Appearances:

BARNWELL & WHALEY, ESQs., by NATHANIEL B. BARNWELL, ESQ., and W. S. MACGILL, ESQ., attorneys for the Plaintiff.

MITCHELL & HORLBECK, ESQs., by HARRY WILLMARTH, ESQ., and F. H. HORLBECK, attorneys for the defendant.

EDNA B. ROMIG,
Official Reporter.

Mr. Horlbeck: Your Honor, we have two preliminary matters; one is we wanted to make a reservation of the objections which have been made in the record, jurisdictional or otherwise. Ordinarily, after a decision of the Supreme Court of the State, that is the end of it. But in the event from any final judgment an appeal might be taken to the Supreme Court of the United States, we desire to preserve our objections and for that reason we wanted to file at the outset before entering the trial the following reservation of objections.

(Mr. Horlbeck then read the document referred to.)

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(After argument the following occurred:)

The Court: I am not going to make any ruling on this. You have a right to file this paper and you have done so. I have no ruling at all to make.

Mr. Horlbeck: Then, your Honor please, we served notice of a motion asking leave to file an amendment to our answer. Counsel has had this more than a year. I think it is—anyhow, when it was pending before Judge Griffith at the last trial—but by reason of the fact that he sustained the demurrer we never got to the point of any necessity for bringing that up. The grounds are briefly this, your Honor: that the cases have made something of the question when suit was started with reference to jurisdiction of the Adjustment Board. Our friends rely very strongly on the *Moore case*, which we think has been altered considerably by the *Pitney case*. But, at any rate, that matter is now before the Adjustment Board as well as before this Court, pending for a decision. We think we are entitled to have that fact set forth so that the whole thing can come up for a hearing and determination.

(After argument, the Court ruled as follows:)

The Court: I have to make a ruling now, and in my better judgment I don't think this amendment should be allowed. So I'll have to refuse the motion to allow the answer to be amended.

Mr. Horlbeck: Would your Honor put that on the ground it is a legal ground rather than a discretionary ground so that the record will show that it was done because of a Supreme Court's decision?

The Court: No; I am just going to rule that I am not going to allow the amendment.

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100 Mr. Horlbeck: Does your Honor's ruling apply to both paragraphs, 21 as well as 17?

The Court: Yes; as to both of them.

Mr. Horlbeck: I don't know that it is necessary to note an exception but we would like to note an exception and preserve the rights.

The Court: Certainly. That being disposed of, what is the next step?

Mr. Barnwell: We better go ahead with our testimony.

200 MR. FRANK B. BIRTHRIGHT, being duly sworn, testified as follows:

Direct Examination

By Mr. Barnwell:

Q. What is your present position with the Southern Railway Company, Mr. Birthright?

A. Superintendent, Charleston Division, Southern Railway Company.

204 Q. Is that the division in which is located the Preg-nall industrial switch at Pregnall?

A. Yes, sir.

Q. The question in dispute here?

A. Yes, sir.

Q. What experience have you had at railroading?

208 A. I was appointed apprentice February 1, 1926, working on bridges, tracks, and other structures. On July 1, 1927, I was appointed assistant train master on the Knoxville Division, working on yards and main lines and having jurisdiction over crews. On August 1, 1931, I was appointed train master on the Charleston Division, working in the same capacity. I was then appointed train master on the Columbia Division.

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Q. You needn't get dates. Just go ahead.

A. I was appointed train master somewhat later on the Columbia Division, and then a little later on on the Danville Division. And on August 1, 1939, I was appointed superintendent of the present division in which capacity I am now working, reporting directly to the general manager at Charlotte, North Carolina, who is my immediate superior. On September 2, 1944, I was appointed Lieutenant Colonel in the United States Army Transportation Corps; went to France to railroad in the same capacity as a division superintendent on the American railroads, returning to this position February 16, 1945.

Q. So that since 1939 to date you have been the superintendent of the Charleston Division except for the period that you were in the United States Army?

A. Yes, sir.

Mr. Barnwell: Your Honor, I think at this time we would save a little time if I would introduce quite a number of exhibits. We would like to introduce photostat copies of original records the railroad is required to keep. I think we have a stipulation as to that.

Mr. Horlbeck: Will you let us see them and satisfy ourselves about them?

Mr. Barnwell: Photostat copy of the ticket filed by Conductor Lloyd, September 7, 1944, claiming additional day's pay for what is alleged on the ticket to be a side trip, Pregnall to Harleyville and return to Pregnall, continued on trip to Branchville.

Mr. Horlbeck: No objection.

(Received in evidence as Plaintiff's Exhibit No. 1.)

Mr. Barnwell: Exhibit 2 is a carbon copy of a letter from Mr. Birthright to Mr. Lloyd, dated September

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11, 1944, signed "F. B. B.", asking Mr. Lloyd to advise under what rule claim of September 7 was made.

(Received in evidence and marked Plaintiff's Exhibit No. 2.)

Mr. Barnwell: Exhibit 3, photostatic copy of reply to Mr. Birthright's letter from Local Chairman Utsey, dated September 24, 1944, stating therein his position is that running on the track in question is an extra side trip not pertaining to the regular trip, Charleston to Branchville. Here is the original and there is the photostat.

(Received in evidence and marked Plaintiff's Exhibit No. 3.)

Mr. Barnwell: Exhibit 4, photostatic copy of time ticket of Conductor Lloyd, dated September 9, 1944, which is the same claim on a different day.

Mr. Horlbeck: Same or similar?

Mr. Barnwell: Whichever you choose to call it. Same kind of claim.

(Received in evidence and marked Plaintiff's Exhibit No. 4.)

Mr. Barnwell: Exhibit 5, copy of carbon letter from Superintendent Ozlesby to Local Chairman Utsey, dated September 25, 1944, declining the claims for September 7 and September 9.

(Received in evidence and marked Plaintiff's Exhibit No. 5.)

Mr. Barnwell: Exhibit 6, photostatic copy of letter dated October 10, 1944, from General Chairman Lawrence to Mr. R. P. Travis, Personnel Officer of Southern Railway Company, asking Mr. Travis to list claims of Conductor Lloyd for conference.

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(Received in evidence and marked Plaintiff's Exhibit No. 6.) 217

Mr. Barnwell: We ask for the original of the letter from Mr. J. W. Cox, Assistant Personnel Officer, to Mr. J. T. Lawrence, General Chairman, dated December 19, 1944.

(Document referred to received in evidence and marked Plaintiff's Exhibit No. 7.)

Mr. Barnwell: Exhibit 8, photostatic copy of Mr. Lawrence's letter of December 26, 1944, in which he states that the movement over the track in question was in violation of Article 5-(a) of the contract. 218

(Received in evidence and marked Plaintiff's Exhibit No. 8.)

Mr. Barnwell: Exhibit 9, copy of carbon copy of Mr. Cox's reply to Mr. Lawrence's letter of December 26, 1944, dated March 23, 1945, asking him why he contended Article 5-(a) of the contract was violated.

Mr. Willmarth: We don't object to the method of proof or the form of proof but we do object to it as a self-serving declaration. 219

Mr. Barnwell: Your Honor, this is a series of exchange of correspondence between the Order of Railway Conductors and the Southern Railway Company, represented by Mr. Cox, who was the proper official to handle these matters concerning these claims. And I submit that the whole correspondence should go in.

The Court: I'll let it in. There is no jury here.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 9.)

Mr. Barnwell: Exhibit 10, copy of carbon copy of Mr. Cox's letter of March 30, 1945, to Mr. Lawrence, 220

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211 asking him to state what rules of the contract he relied on to support his contention.

(Received in evidence and marked Plaintiff's Exhibit No. 10.)

By Mr. Barnwell:

Q. Mr. Birthright, you heard me introduce these various exhibits?

A. Yes, sir.

Q. They refer to the claim of two conductors in connection with the switching at Pregnall, South Carolina?

A. Yes, sir.

Q. Is this the customary way for handling such claims?

A. Yes, sir.

Q. The method that is shown by these letters?

A. Yes, sir.

Q. Have you had many claims filed by conductors from time to time with reference to various matters?

222 A. Yes, sir.

Q. Have you ever had a claim filed by a conductor where he claimed extra pay for switching on an industrial track?

Mr. Willmarth: That is objected to as immaterial, irrelevant, incompetent, and calling for a conclusion and an opinion.

(After argument the following occurred:)

224 Mr. Willmarth: Your Honor, in view of counsel's statement, I further object to the question in that it does not tend to establish an established practice or custom as interpreted by the parties to this contract.

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The Court: I think I'll have to overrule your objections. Let the record show that after argument the objection was overruled.

By Mr. Barnwell:

Q. What is your answer?

A. Yes, sir.

Q. Have you ever heard of any such claim being paid?

Mr. Willmarth: Same objection. Also calling for hearsay.

By Mr. Barnwell:

Q. Have you in your experience and practice known of any such claims?

Mr. Willmarth: Same objection last made.

The Court: I'll have to overrule the objection.

By Mr. Barnwell:

Q. What is your answer to that?

A. No, sir.

Q. What is the meaning, Mr. Birthright, in railroad language or railroad circles of straightaway run?

Mr. Willmarth: That is specifically defined in the contract. If your Honor will turn to Schedule, I think it is 5(a), the contract being the best evidence.

The Court: You are right on that if it is in here.

Mr. Barnwell: No doubt about that.

Mr. Willmarth: 5(b); page 8.

By Mr. Barnwell:

Q. Referring to Article 5(b), it says: "In through freight or mixed train service, a straightaway run is a run from one terminal to another terminal; and not less than one hundred miles will be allowed for each such run, except as provided for in Article 28." Does that definition of a "straightaway run" with refer-

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ence to through freight or mixed train service apply the same to local freight service?

A. Yes, sir.

Mr. Willmarth: That is objected to as calling for the conclusion and opinion of the witness; and further reason that the contract itself is the best evidence of the meaning of the term; further, that the evidence is incompetent, irrelevant, and immaterial and in no manner binding on this defendant.

(After argument the following ruling was made.)

The Court: I'll have to overrule your objection. There is no jury here now.

Mr. Willmarth: I still need to preserve my record, your Honor.

The Court: Has the witness answered?

(The last question was read by the reporter.)

A. Yes, sir.

By Mr. Barnwell:

Q. In Article 8 of the contract we find: "In through freight or mixed train service, a turnaround run is a run from a terminal to an intermediate point and return to the starting terminal, and not less than one hundred miles will be allowed for each such run, except as provided in section (b)." Does that definition in railroad parlance of a turnaround run apply equally to local freight service?

Mr. Willmarth: Same objection.

The Court: Objection overruled.

A. Yes.

By Mr. Barnwell:

Q. What local freight trains do you run between Charleston and Columbia?

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A. At the present time we are operating what is known as tri-weekly service. For example, the local leaves Charleston in the morning on Monday, goes to Branchville and camps and returns to Charleston Tuesday. That same procedure is followed Wednesday, Thursday, Friday, and Saturday, with no service on Sunday. We have like service between Branchville and Columbia, the local leaving Monday morning, going to Columbia, camping for the night, the same crew returning to Branchville on Tuesday. They then go up Wednesday, back Thursday, up Friday and back Saturday, with no service on Sunday. Same crew.

Q. Those are the trains referred to in the complaint as No. 60 and 61?

A. Yes, sir.

Q. In what type of service are the conductors on this run? We are specifically concerned now with the trains running between Charleston and Branchville.

A. Local freight service.

Q. And what type of run is it?

Mr. Willmarth: That is objected to for the reason it is calling for the conclusion and opinion of the witness, the contract itself being the best evidence. It is incompetent, immaterial, and irrelevant, and in no manner binding on this defendant.

The Court: I'll have to overrule the objection.

A. That was a straightaway run.

Q. In determining the pay of conductors, do the duties performed determine the type of service?

Mr. Willmarth: That is objected to as too vague and indefinite and in no way binding on this defendant.

The Court: I'll have to overrule it.

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Mr. Willmarth: The further objection, that the contract itself determines the pay, and it does not relate to the best evidence.

The Court: Of course, the contract, if the contract determines the pay, why that fixes the pay. There is no question about that.

Mr. Barnwell: No doubt about that.

A. Yes, sir.

Q. Under the provisions of Article 4 on page 6, referring to freight service, is there or not a difference in the rate of pay between the conductor on through freight and mixed service and the conductor on local freight?

A. Yes, sir.

Mr. Barnwell: I think, your Honor, it is understood and so alleged in the complaint those figures as to the rates of pay are not the present figures. The contract has been amended so that those rates are a great deal higher than those stated in the complaint. In fact, they are a great deal higher now than they were at the time the suit was brought.

Q. Referring to that article, who gets the higher pay, the local freight conductor or the through freight conductor?

A. The local freight conductor.

Q. On the run west from Charleston, what is the initial terminal?

A. Charleston.

Q. And what is the final terminal?

A. Branchville.

Q. Suppose instead of being a straightaway run, as you have testified, this were a turnaround run. What would be the initial and final terminal?

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Mr. Willmarth: Objected to as irrelevant, incompetent, and immaterial, and in no manner binding on this defendant.

The Court: I'll have to overrule it.

A. The initial terminal is Charleston and on a turnaround run it would go to Branchville, which would be an intermediate point, with the run returning to its starting terminal which would be Charleston.

Q. So that Charleston would be both the initial and the final terminal on a turnaround run?

Mr. Willmarth: Same objection.

A. Yes, sir.

Mr. Willmarth: May the objection stand ahead of the answer. He answered too quickly.

Mr. Barnwell: As Exhibit 11, we offer in evidence blueprint showing the industrial track at Pregnall, South Carolina, and the connections with the plaintiff's main line.

Mr. Willmarth: The only objection I have, Mr. Barnwell, is the calling of your industrial track, which is an assumption not in the record. If you call it a track, we have no objection to the introduction of the exhibit—other than your assumption it is an industrial track.

Mr. Barnwell: I'll introduce it by its title, your Honor. Blueprint showing track.

(Document received in evidence and marked Plaintiff's Exhibit No. 11.)

Q. Will you look at that plat, Mr. Birthright?

(Exhibit No. 11 handed to the witness.)

Q. Before we come to that—what is the distance from Charleston to Branchville?

A. Approximately 63 miles.

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Q. Is it, or not, Pregnall on the Southern Railway line between Charleston and Branchville?

A. Yes, sir.

Q. How far is it from Charleston and how far from Branchville?

A. Pregnall is 41 miles from Charleston and about 22 miles from Branchville.

Q. Is Pregnall a railroad terminal?

Mr. Willmarth: That is objected to as an assumption and calling for a conclusion and opinion and in no way binding on this defendant.

A. No, sir.

The Court: He is the superintendent of the railroad. I suppose he must know what the terminal is. I think he has a right to answer. Your answer was what?

A. It is not a terminal, sir.

By Mr. Barnwell:

Q. What is it?

Mr. Willmarth: That is further objected to as calling for the conclusion and opinion of the witness, the contract itself being the best evidence as to what it is on this particular run. It is in no manner binding on this defendant.

Mr. Barnwell: This is the superintendent, your Honor, of the railroad. He is giving a description of the property under his control.

The Court: I'll overrule the objection.

By Mr. Barnwell:

Q. What is it?

A. Pregnall is a way local station.

Mr. Willmarth: A what?

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The Witness: A way local station—w-a-y; a way local station. You can leave out the "way" if you want to. It is just a local station.

Q. Is it an agency station?

Mr. Willmarth: Same objection.

Q. Is it an agency station?

A. It is a non-agency station.

Q. Or local station?

A. Yes, sir.

Q. It is a non-agency station?

Mr. Willmarth: Same objection.

The Court: I'll have to overrule it.

Q. Does the railroad quote any rates on business moving to and from Pregnall?

Mr. Willmarth: That is objected to as irrelevant and immaterial, and in no manner binding on this defendant.

A. Yes, sir.

The Court: I'll let the answer in.

Q. Are you familiar with the track at Pregnall which serves the plant of the Ancor Corporation?

A. Yes, sir.

Q. What is that?

Mr. Willmarth: That is objected to—

A. It is an industrial track.

Mr. Willmarth: —as calling for the conclusion of the witness, and in no manner binding on this defendant. And may the witness be instructed to give the leave to interpose my objection.

The Court: I'll have to overrule the objection.

Q. It is an industrial switching track?

Mr. Willmarth: Same objection.

A. Industrial switching track.

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The Court: Overrule it.

Q. Who owns that track?

A. The defense plant corporation.

Q. How long is that track?

A. Six and one-quarter miles.

Q. On business moving to and from the plant of Ancor Corporation, what rates are used?

Mr. Willmarth: Objected to as calling for matters irrelevant and immaterial and in no manner binding on this defendant.

The Court: I'll have to overrule it.

A. The rates are based on Pregnall, which are filed with the Interstate Commerce Commission.

Q. Are there or not any rates to points on the industrial track or to Ancor Corporation based on that track?

A. No, sir.

Mr. Willmarth: Same objection last hear.

The Court: Overrule the objection.

Mr. Willmarth: Further add to the objection that the question of what rates the railroad gets has no bearing on the issues as to the pay due the conductors.

The Court: I don't think it has.

Mr. Barnwell: We just ask are there any published. We are not going into the rate question.

The Court: All right.

Q. What was this track from Pregnall out to the Ancor Corporation constructed for?

A. It was constructed to serve the Ancor Corporation, which is a private industry.

Q. And where is that located with reference to the industrial track?

A. It is located at the end of it.

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Q. Does or not the railroad serve the general public or any general territory on this track?

A. No, sir.

Mr. Willmarth: That is objected to as immaterial and irrelevant and in no manner binding on this defendant.

The Court: I'll have to overrule the objection.

Q. Did it do so at or prior to the commencement of this suit?

Mr. Willmarth: Same objection?

A. No, sir.

The Court: Overruled.

Q. Is or not the service on this track a matter of public concern?

Mr. Willmarth: Same objection and, further, calling for the conclusion and opinion of the witness.

The Court: I'll have to overrule the objection.

A. It is not a matter of public concern. It is strictly a private industrial arrangement.

Q. Does or did the railroad at any time up to or since the commencement of this action serve any of the public living around the plant on this industrial track?

Mr. Willmarth: Same objection.

The Court: I'll have to overrule the objection.

A. No, sir.

Q. Or any of the public in between Pregnall and the Ancor Corporation?

Mr. Willmarth: Same objection.

The Court: Overruled.

A. No, sir.

Q. Referring to that blueprint that is in evidence, Exhibit 11, I note that shortly before you get to the

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901 Ancor Corporation that track springs out from that industrial switch which is marked track of Volunteer Cement Company. What is Volunteer Cement Company?

A. It is a private industry.

Q. And that track that springs out of this is for the purpose of serving that private industry?

A. Yes, sir.

Q. When was that built, before or after this controversy arose?

902 A. Afterwards.

Q. And also after the suit was brought?

A. Yes, sir.

Q. That is also private?

A. That is a private industrial track.

Q. So, as I understand, up until the time of the Volunteer Cement track, the only party served was the Ancor Corporation?

Mr. Willmarth: Objected to as immaterial and irrelevant.

903 The Court: I'll have to overrule the objection.

A. Yes, sir.

Q. Look at that plat. Is there a town called Harleyville—tell me where is Harleyville with reference to that track.

A. It is two miles more or less south of the Ancor Corporation.

Q. The track runs through the town of Harleyville?

A. Yes, sir.

Q. Why is that not shown on your plat?

904 A. Because it is not customary to show towns on any industrial track.

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Mr. Willmarth: That is objected to as immaterial and irrelevant and move to strike the answer for the reasons urged in the objection.

The Court: I'll have to overrule the objection.

Q. As I understand it, in railroad plats you simply put down the necessary information concerning the track; is that right?

A. The track only, yes, sir.

Q. And the fact that Harleyville doesn't appear on this is simply in accordance with the custom of the railroad in making these plats?

A. This is the customary manner in which they are prepared.

Q. Have you ever had any requests to serve people in or around the town of Harleyville?

Mr. Willmarth: Objected to as immaterial and irrelevant and foreign to any issue in this case.

The Court: I'll have to overrule the objection.

A. Yes, sir. We have had requests.

Q. Has any such service ever been given?

Mr. Willmarth: Same objection.

The Court: Overruled.

A. No, sir.

Q. Does the railroad have any station at Harleyville?

Mr. Willmarth: Same objection last heard.

The Court: Overruled.

A. We have no station, no, sir.

Q. Are there any stations at all on this industrial track other than the station at Pregnall from which it starts?

Mr. Willmarth: Same objection.

The Court: Overruled.

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A. No.

Q. When a crew performs the service on this industrial track between Pregnall and Ancor Corporation, what kind of orders are given to govern its operations?

Mr. Horlbeck: Wouldn't the orders be the best evidence?

Mr. Barnwell: If there are any.

Mr. Willmarth: If you introduce the orders, we have no objection.

By Mr. Barnwell:

Q. I'll ask it this way; when a crew is performing service on this industrial track are any special orders given?

A. Colonel, I'd like to change the wording there. No orders are issued.

Q. Running orders?

A. No orders are issued. Instructions are issued in the form of a message from the chief dispatcher. For example, when we did considerably heavy switching at the plant, the manager would call our agent at St. George and tell him how he wanted the cars placed in his plant. Our agent would then wire our chief dispatcher, who would issue appropriate instructions in the form of a message to the conductor prior to his leaving Charleston.

Mr. Willmarth: I object to the answer and move to strike all that part with reference to the procedures followed by the railroad in issuing the instructions and object to the answer on the grounds that the instructions themselves are the best evidence.

Mr. Barnwell: This is the man who issues them.

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The Court: He is the superintendent of the road, you know. 373

The Witness: Your Honor, this system has been in effect as long as the railroad, as far as I know.

The Court: I'll overrule the objection.

Q. Any regular trains operated over this track?

Mr. Willmarth: That is objected to as immaterial and irrelevant.

A. No, sir.

The Court: Overruled.

Q. Neither have been or were? 374

Mr. Willmarth: Same objection.

The Court: Overrule both objections.

A. No, sir.

Q. What kind of service is performed by the crew when it operates on this track?

A. Industrial switching.

Mr. Willmarth: I move to strike the answer. It is unresponsive to the question and expressing a conclusion and opinion of the witness and invading the province of the Court. 375

The Court: I'll have to overrule the objection.

Q. Is any express, passenger or mail service provided by Southern Railway on this track?

Mr. Willmarth: Same objection.

The Court: Overrule the objection.

A. No, sir.

Q. Are there any agents located on this track?

Mr. Willmarth: Same objection.

The Court: Overrule it.

A. No, sir. 376

Q. Are there any buildings or loading platforms owned by the railroad on this industrial track?

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m Mr. Willmarth: Same objection.

The Court: Overrule it.

A. No, sir.

Q. Does Southern Railway have any telegraph or telephone communication system along the track?

Mr. Willmarth: Same objection.

The Court: Overrule it.

A. No, sir.

Q. Does the company issue any bills of lading to or from points on this track?

m Mr. Willmarth: Same objection.

The Court: Overrule it.

A. No, sir.

Q. Your billing is what?

Mr. Willmarth: Same objection?

The Court: Overrule it.

A. Based on Pregnall.

Mr. Willmarth: Add to the objection, it is foreign to any issue in this case, if I have not already urged it.

The Court: Overrule the objection.

m Q. How is it determined whether on a particular trip a crew will switch this or any other industrial track?

Mr. Willmarth: That is objected to as irrelevant and immaterial and in no manner binding on this defendant, and calling for the conclusion and opinion of the witness.

The Court: I'll have to overrule the objection.

(The question was read by the reporter.)

A. Well, it depends on whether the industry requires any cars to be placed for loading or unloading. And if they require some switching, say, for example, on the industrial spur at Ancor Corporation, the agent at

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St. George is notified by telephone and this same information is transmitted to the local freight conductor through the chief dispatcher at Charleston.

Q. What are the duties of the crews in local freight service?

Mr. Willmarth: That is objected to as calling for the conclusion of the witness, the contract itself being the best evidence.

The Court: I'll have to overrule the objection.

Q. What are the duties of crews in local freight service?

A. They perform all industrial switching on the run such as setting out cars, picking up cars, unloading freight, roadway material, and so forth. This work is performed on common team tracks serving the public in general, house tracks, industrial tracks, and so forth.

Mr. Willmarth: Object and move to strike all that part of the witness's answer as to where the work is performed. It is conclusion and opinion. The contract is the best evidence and it is in no manner binding on this defendant.

The Court: He is the superintendent of the railroad. He must know. I'll have to overrule the objection.

Q. Are you familiar with the contract between the Southern Railway Company and Order of Railway Conductors, a copy of which is attached to the complaint, a copy of which I hand you?

A. Yes, sir.

Q. Which are the rules governing the computation of pay of conductors in freight service?

A. Five, six, and seven.

Q. Will you please read those rules?

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983 A. On page 8 of the contract, "Schedule of Wages and Rules and Regulations for Conductors", Article 5: (Reading) "Basic Day. (a) In all road service, except passenger, 100 miles or less, 8 hours or less (straightaway or turn-around), shall constitute a day's work; miles in excess of 100 will be paid for at the mileage rates provided, except as provided for in Article 28.

984 "(b) In through freight or mixed train service, a straightaway run is a run from one terminal to another terminal and not less than one hundred miles will be allowed for each such run, except as provided for in Article 28.

"Article 6. Beginning and Ending of Day: In all classes of service, other than passenger, conductors' time will commence at the time they are required to report for duty and shall continue until the time they are relieved from duty at end of run.

987 "Article 7. Overtime. In all service, except passenger, runs of 100 miles or less, overtime will begin at the expiration of 8 hours; on runs of over 100 miles overtime will begin when the time on duty exceeds the miles run divided by $12\frac{1}{2}$. Overtime shall be paid for on the minute basis, at a rate per hour of three-sixteenths of the daily rate, as shown in Article 4, Sections (a), (b) and (c)."

Mr. Barnwell: For the purpose of the record, we'd like to offer this in evidence formally. It is attached to the complaint. It is properly in evidence.

988 (The document was received in evidence and marked Plaintiff's Exhibit No. 12.)

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Q. Are conductors on the runs between Branchville and Charleston paid under the terms of the rules you have just read? 289

A. Yes, sir.

Mr. Willmarth: That is objected to as calling for his conclusion and opinion. He has not shown himself qualified to state how they are paid.

The Court: I'll have to overrule the objection. He is the superintendent of the railroad.

Mr. Willmarth: There is the further objection that the contract itself is the best evidence as to how they are paid. 290

The Court: He can't vary this contract but he can state it exactly as the contract states it.

Q. When I say "are", Mr. Birthright, I want you to understand I am also referring to up to the time of this suit and at the time the suit was commenced; not simply what you are doing today. I sometimes say "Are you doing it?" when I mean were you at the time of the commencement of the suit or prior thereto. I want to get that clear. 291

The Court: Do you understand that, Mr. Birthright?

The Witness: Yes, sir; I understand.

Q. I understood you to testify that Charleston is 63 miles from Branchville; is that correct?

A. That is correct, sir.

Q. Under the rules that you have just read, conductors are paid for a minimum of eight hours' work or a hundred miles at local freight rates with time and one-half after eight hours; is that correct?

A. That is correct. 292

Mr. Willmarth: Objected to as calling for conclusion. The rules will speak for themselves.

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Q. So that on this run where the distance is 63 miles, less than 100 miles, the conductors are paid at?

A. Paid for 100 miles.

Q. Paid for 100 miles although it is only 63 miles?

A. Yes, sir.

Mr. Willmarth: That is objected to as calling for his conclusion and opinion, the contract itself being the best evidence; the further objection, this witness has not shown himself qualified to testify on behalf of the Southern Railway as to how these men are paid.

The Court: I'll have to overrule the objection. He is the superintendent of the road.

Q. If they work over eight hours, how are they paid?

Mr. Willmarth: Same objection last urged.

The Court: Overrule the objection.

A. After eight hours they are paid time and one-half.

Q. When you were assistant train master, train master, and superintendent, was it a part of your duties to either issue or supervise the issuance of bulletins?

A. Yes, sir.

Q. Have you had occasion to issue them?

A. Yes, sir.

Q. Explain what a bulletin is and what a bulletin should contain.

Mr. Willmarth: That is objected to as calling for the conclusion and opinion of the witness, the contract itself being the best evidence as to what the bulletin should contain. It is in no manner binding on this defendant.

The Court: I'll have to overrule the objection.

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A. When a new run is established, and in agreement with the orders, it is customary for the train master to issue a bulletin advertising a run. And in this bulletin he states, for example, that he wants one conductor, a flagman and a brakeman, for example. They are given six days to bid on these jobs. Also incorporated in the bulletin is the points between where the runs are to be operated and approximate times that the crews are to go on duty. And then the bulletin is usually wound up by saying that the oldest qualified employees desiring these runs will submit their bids on or before midnight blank date. The train master then assigns the oldest qualified employees whose bids he has received.

Mr. Willmarth: Further add to my objection, the bulletin itself on these runs is the best evidence.

The Court: I'll have to overrule the objection.

Mr. Willmarth: We have no objection to the bulletin going in attached to the answer. We have a copy here, if you like.

Mr. Barnwell: I'm just going to show it to him. It is attached to the answer.

Mr. Willmarth: No objection to that going into evidence, bulletin or a copy thereof that is attached to the answer.

Mr. Barnwell: I don't know what is objected to.

Mr. Willmarth: Objected to as to his conclusions as to what it contains.

(A document was handed the witness.)

By Mr. Barnwell:

Q. Referring to the bulletin attached to defendant's answer, when this tri-weekly service that you have testified to was established between Charleston and Branchville, how was the run bulletined?

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Mr. Willmarth: Same objection last heard and for the further reason that the witness is being asked to refer to a document not offered or introduced in evidence.

Mr. Barnwell: It is attached to his answer, your Honor.

The Court: I'll have to overrule the objection.

A. I have it before me. Shall I read it, sir?

Mr. Barnwell: You might let it in evidence now.

The Witness: I'll read it and then explain it, if that is agreeable to the Court.

Mr. Willmarth: We offer no objection to his reading.

Mr. Horlbeck: We don't object to his reading. We don't know about his explaining it or contradicting it afterward. We have no objection in the world to the bulletin going in but what inferences and deductions and changes afterwards, we don't know until we get to it.

Mr. Barnwell: I'm asking him to read a part of his answer, which is the bulletin.

The Court: Let's read it. Everybody agrees on his reading it.

A. (Reading) "Southern Railway Company, Charleston Division, Charleston, S. C., June 4th, 1944. Bulletin No. TM-46. Conductors and Trainmen:

"Effective Monday, June 12, 1944, all local freight service between Charleston and Columbia will be discontinued, and the following local freight service inaugurated:

"No. 60 leave Andrews Yard Mondays, Wednesdays, Fridays, at 7:00 A. M. Camp at Branchville, and come on duty at Branchville at 10:30 A. M., on Tuesdays,

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Thursdays and Saturdays as local west to Andrews Yard.

"No. 61 leave Charleston on Tuesdays, Thursdays and Saturdays at 7:45 A. M. Camp at Branchville. Come on duty at Branchville at 10:30 A. M., on Wednesdays, Fridays and Mondays. Run local east to Charleston.

"These changes create vacancies, effective Monday, June 12, 1944, for the following:

"1 Conductor, 1 Flagman and 1 Brakeman, local freight service between Andrews Yard and Branchville, with Sunday layover at Andrews Yard.

"1 Conductor, 1 Flagman and 1 Brakeman, local freight service between Branchville and Charleston, with Sunday layover at Branchville.

"Qualified applicants desiring these positions will file written application with the undersigned not later than midnight Friday, June 9, 1944, which is end of the bulletin period." Signed "R. H. Graham, Trainmaster."

By Mr. Barnwell:

Q. Based on your experience as a trainmaster, assistant trainmaster and superintendent, is or is not that a complete bulletin?

Mr. Horlbeck: That is objected to. Can he describe the bulletin in that way, your Honor, by saying it is a complete bulletin? It seems to me he is putting things in and putting different interpretations on them. There is a written document. It doesn't say whether it is complete or not.

Mr. Barnwell: Based on his experience.

The Court: I'll overrule the objection.

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300 Mr. Willmarth: Just a minute. I want to add to that objection, it is objected to as calling for the conclusion and opinion of the witness, the bulletin itself being the best evidence, and also that the contract between the conductors and the Southern Railway is the best evidence of what the bulletin contained, and the question and answer is in no manner binding on this defendant.

The Court: I'll have to overrule the objection. This is a superintendent of the road and he has testified that he has had broad experience in these matters, train-master on up.

310 Mr. Willmarth: Further, add to my objection that he has not shown himself qualified to testify as to what the bulletin should contain.

The Court: I'm just afraid that he has shown himself qualified. Go ahead.

By Mr. Barnwell:

Q. Is or not that bulletin in accordance with the established practice and form of this division? Charleston Division?

311 A. Yes, sir.

Mr. Willmarth: Same objection last urged and the further objection that it is in no manner tending to show established practice on the Southern Railway.

The Court: I'll have to overrule the objection.

Q. Is it or not the practice to mention industrial tracks to be switched when a run is bulletined?

Mr. Willmarth: Same objection last urged.

The Court: Overruled.

A. They are never mentioned, no, sir.

320 Q. Have the conductors involved in this case or any of the conductors of the Charleston Division, so far as you know, ever complained because industrial switch-

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ing to be performed was not mentioned in the bulletin covering the run? m

Mr. Willmarth: Same objection last urged. Immaterial and irrelevant.

The Court: Have to overrule it.

A. They have never complained.

Q. Are there any industrial tracks on the lines between Charleston and Branchville other than this defense plant corporation? m

Mr. Willmarth: Objected to as calling for the conclusion and opinion of the witness and in no manner binding on this defendant. m

The Court: Overruled. You haven't answered that yet.

(The question was read by the reporter.)

A. Yes, sir. There are a number of them.

Q. Starting from Charleston, will you give me the various industrial tracks between Charleston and Branchville?

A. Yes, sir. I'll give you several very important ones. m

Q. Just give me the ones that exist. Have you got a memorandum of it?

A. Yes, sir.

Mr. Willmarth: Same objection last urged.

The Court: Overruled.

Q. Refreshing your memory from this memorandum, will you tell me just what industrial switching tracks there are between Charleston and Branchville?

Mr. Willmarth: Same objection last urged.

The Court: Objection overruled. m

A. Some are not on here, Colonel, but I will list those from memory. For example, at Lincolntonville,

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117 South Carolina, or approximately in the vicinity of
Lincolnvillie, we have a track which is an industrial
spur, which is 1,000 feet more or less and serves the
National Distillers. That track is owned in its entirety
from the clear post by the National Distillers Com-
pany, over which we perform switching as required by
this company. At Summerville we have what is known
as a brickyard track. This track is approximately 1,800
feet in length. It is an industrial track owned by the
Southern Railway Company. It is a combination in-
118 dustrial track and team track owned by the Southern
Railway Company on which switching is performed
every day and on this track are located a number of
industries; Butane Gas, Texas Company, Vestal
Lumber Company, and what is known as the Brick-
yard. And on portions of this track it has been used a
number of times as a common team track. This track
is owned in its entirety by the Southern Railway Com-
pany. Also at Summerville we have what is known as
the Summerville Ice and Fuel Company track, approx-
119 imately 1,000 feet long. That is an industrial track on
which is located the ice plant. We also have an auto-
mobile unloading platform which is open to the public.
Also on this track is the Augusta Hardwood Company
which has a track leased from the Southern Railway
Company and which industry is also served by the local
freight.

Q. Are those industrial tracks all owned by the
Southern or party owned, or what?

120 A. This track last mentioned is owned in its entirety
by the Southern Railway Company. It is a double end
track, switch on each end, and owned entirely by the
Southern Railway Company. We also have at Summer-

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ville another industrial spur 1,563 feet in length more or less on which is served only the Ocmulgee Lumber Company. This track is owned by the Southern Railway Company but maintained by the Ocmulgee Lumber Company by agreement. At Ridgeville, South Carolina, the Southern Railway Company owns a track approximately 600 feet long, and has recently been lengthened about 200 feet; 800 feet more or less in length. It is a spur track. It serves the Flack-Jones Lumber Company and on one end is used as a common team track. It has not been in use as a team track lately but in the past, considerably so. This track is maintained by the Flack-Jones Lumber Company, that portion which they use. The balance of the track is maintained by the Southern Railway Company. But owned by the Southern Railway. At St. George we have what is known as the Oil Mill track, which serves the Dorchester Cotton Oil Company and is 793 feet in length, more or less, an industrial spur serving this company and owned by the Southern Railway Company. We also have another industrial track owned by the Southern Railway Company 1,287 feet in length more or less and owned by the Southern Railway Company.

Mr. Willmarth: Where is that?

The Witness: That is at St. George, South Carolina. They are all of the industrial tracks that we have between Charleston and Branchville other than common team tracks, owned by the Southern Railway Company and open to the public in general.

Q. You mean that they are all, including the Preg-nall track?

Mr. Willmarth: Same objection.

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The Court: I'll overrule it.

A. I was just assuming, Colonel, we had already discussed Pregnall.

Q. You mean to include it?

A. The industrial spur from Pregnall to the Anchor Corporation is included. I described that as being six and one-quarter miles in length.

Mr. Willmarth: Objection.

The Court: I'll have to overrule the objection.

Q. Then next comes Branchville after Pregnall?

Mr. Willmarth: Same objection.

The Court: Overrule the objection.

A. All the tracks at Branchville are in the form of a house track or common team track open to the public.

Q. Not industrial switching?

Mr. Willmarth: Same objection.

The Court: Have to overrule the objection.

A. Public in general are served on these tracks.

Q. You say you have listed all between Charleston and Branchville?

A. All of the industrial spurs.

Mr. Willmarth: Same objection.

The Court: Overrule the objection.

Q. Are or have any of these industrial tracks been mentioned in any bulletins establishing any runs?

Mr. Willmarth: Objected to as calling for his conclusion and opinion, the bulletins themselves being the best evidence and also the contract being the best evidence as to what the bulletin contained. It is in no manner binding on this defendant.

The Court: I'll have to overrule the objection.

A. They are never mentioned in bulletins.

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Q. Have or not the crews of the local freight trains performed switching on these tracks without objection? That question eliminates the Pregnall one because—

Mr. Willmarth: Objected to.

Q. Taking all of the rest of them, has there ever been any objection from the crews of the local freight trains performing switching on these spur tracks in spite of the fact they don't appear in the bulletin?

Mr. Willmarth: Objected to as calling for the conclusion of the witness, the records of the company being the best evidence as to whether objection has been made. Further, it is in no manner binding on this defendant, and not tending to establish any custom or practice on the Southern Railway Company.

The Court: I'll have to overrule the objection.

A. There has never been any complaint.

Q. On that part?

A. No, sir.

Q. With reference to the other trains mentioned in that bulletin—that is, industrial tracks between Branchville and Columbia—have you any industrial tracks between Branchville and Columbia?

A. Yes, sir.

Mr. Willmarth: Objected to as calling for the conclusion and opinion of the witness and foreign to any issue in this case.

The Court: I'll have to overrule the objection.

Q. Will you start at Branchville and give the industrial tracks?

Mr. Willmarth: Same objection last urged, for all the reasons urged to the former question.

The Court: Same ruling on it.

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Q. Your Honor, in describing Branchville, I left out one industrial track there because we had cancelled the agreement with this particular concern. But during this controversy this particular industrial track was served by the local freight trains; a track owned by the Southern Railway Company, 725 feet in length more or less, a spur track, the Champion Paper Company maintaining that portion of the track which they used. We also have another track at Branchville which is served from time to time by several concerns there but I would class it as a common team track, although the following concerns do get their freight on these tracks at—

Q. You can leave that one out. That is not strictly an industrial track.

A. Yes, sir. Going to Orangeburg, South Carolina. The Southern Railway Company owns a spur track, an industrial spur 726 feet in length, on which is served the Palmetto Bakery, and that portion that they do not use is a common team track open to the public. There is another track listed here serving the Standard Oil Company, but the agreement has been cancelled and the track is being removed.

Q. Was that in operation at the time this case arose?

A. It was open to operation, sir, but these people no longer patronized the rails and have not received any freight for the last eight or ten years, which accounts for the track having been removed and the agreement cancelled.

Mr. Willmarth: That is at Orangeburg?

The Witness: Yes, sir. At Orangeburg, Standard Oil Company.

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By Mr. Barnwell:

Q. That track, as I understand, was not in use at the time that these bulletins were issued?

A. No, sir. If it was used it was for the convenience of the Southern Railway Company, for example.

Q. And not as an industrial track?

A. No, sir. We might have set out car ties or car ballast for own convenience.

Q. I want to limit your testimony to the industrial tracks.

A. Yes, sir. Also at Orangeburg we have a track serving the Southern Cotton Oil Company, two of them. One of them 250 feet in length more or less and another 916 feet in length more or less, and are industrial spurs which are served by the Southern Railway Company. These tracks are also open—one of them is open to switching by the Atlantic Coast Line Railway, at the end of which we connect with, and is served as an interchange track between the Southern Railway Company and the Atlantic Coast Line Railway Company. We own the tracks—the Southern Railway owns the tracks. There is another long spur in this immediate vicinity on which is served the Southern Manufacturing Company, the Palmetto Sash and Door Company, and a cotton mill. This track is 1,500 feet long and is owned by the Southern Railway Company and is open to reciprocal switching with the ACL. The Southern Railway Company also owns another industrial spur at Orangeburg serving Barton Warehouse, 594 feet in length more or less. Southern Railway Company also owns another industrial spur serving the Mutual Wholesale Company, 200 feet in length more or less. The Southern Railway Company also

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owns another industrial spur, springing behind the freight depot, 1,375 feet in length more or less, serving W. A. Livingston Wholesale Grocer, the Orangeburg Ice and Coal Company. And we also have another industrial spur behind the freight depot known as the Jenkins track, 579 feet in length more or less, serving W. A. Livingston and Company. At St. Matthews, South Carolina, the Southern Railway Company owns a track, an industrial spur, serving the Southern Cotton Oil Company, and it is 773 feet in length. This track is a combination industrial and team track. Now, on our house track at St. Matthews—

Q. I don't know, Mr. Birthright, that you need to go into all of this. If you will just give me the industrial tracks of the approximate length and then when you get through if you will indicate which of them may be owned by other parties.

A. I am practically through now, sir. I just have two more. On this house track at St. Matthews, which is 1,504 feet in length, we serve Shep Perlstine. There is one other industrial spur at St. Matthews, the Banks Lumber Company, 980 feet in length more or less, which is owned by the Banks Lumber Company and maintained from the clear post to the end by this concern, Southern Railway Company maintaining the turnout from switch point to clear post. That is all, sir.

Q. Are any of those industrial tracks that you have mentioned owned in whole or in part by an industry and not by the Southern Railway?

A. Some are and some aren't, yes, sir. For instance, the Banks track at St. Matthews is owned by these people: The track serving the National Distillers at Lincolnton is owned by those people.

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Q. Those are the only ones you recall outside completely owned? 344

A. They are the most important ones, yes, sir.

Q. Are there any other? I mean, isn't there one at Orangeburg partly owned?

A. We own all of those.

Q. With reference to those industrial tracks, have the crews of local freight trains switched those when so instructed?

Mr. Willmarth: Objected to; immaterial and irrelevant and foreign to any issue in this case and not binding on this defendant. 345

The Court: Overrule the objection.

A. They have always switched them.

Q. Outside of the Pregnall situation, was or not any extra compensation claims made?

Mr. Willmarth: Same objection last urged.

The Court: Same ruling.

A. No, sir.

Q. Referring specifically to this non-agency station at Pregnall, has the railway a yard limit at Pregnall? 347

Mr. Willmarth: Same objection.

The Court: I'll have to overrule the objection.

A. Yes, sir; there are yard limit boards at Pregnall.

Q. Where are they located?

Mr. Willmarth: Same objection last urged.

The Court: Overrule it.

A. They are stationary boards located on either side of the station.

Q. Whereabouts with reference to the main line?

Mr. Willmarth: Same objection. 348

The Court: Overruled.

A. They are located on the main line.

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Q. By referring to the blueprint that you have, above the station at Pregnall indicated you have "West Yard Limit" and below it "East Yard Limit." Are those the locations of the yard limit boards?

Mr. Willmarth: Same objection.

The Court: Have to overrule the objection.

A. Yes, sir; that is where they are located.

Q. And referring again to the plat, does it indicate that the industrial switching track leading to Ancor Corporation is located between those yard limit boards?

Mr. Willmarth: That is objected to as calling for his opinion and conclusion, and he has not shown himself qualified to testify what the plat shows, the plat itself being the best evidence. It is foreign to any issue in this case and in no manner binding on this defendant.

The Court: The plat, of course, Mr. Barnwell, shows it.

Mr. Barnwell: I am just getting him to explain the plat. I think I have a right to do that.

The Court: Go ahead. The Court can read plats, you know, plain as day.

A. Yes, sir. The industrial spur springs off between the two yard limit boards.

Q. What is the purpose of these yard limit boards at such a station as Pregnall?

Mr. Willmarth: Same objection last urged.

The Court: Same ruling. Go ahead.

A. Yard limit boards which are stationary boards and marked so are placed on either side of a station for the purpose of obtaining the services of all the members of the crew so that they won't have to flag. For example, if there were no yard limit boards at

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Pregnall, it simply means that the flagman would have to go the required distance to the rear to protect the rear of his train. And by placing the yard limit boards there we can then go within the confines of same and avail ourselves of the use of all the members of the crew. Now, of course, this applies only in the case of flagging, in protection against all other trains except passenger trains. They are required to flag against passenger trains anywhere. And that is the purpose of establishing yard limit boards.

Q. Where the switch connecting a spur track is within yard limits, to what extent do yard limits apply to that spur track?

Mr. Willmarth: Same objection last urged.

The Court: Have to overrule it.

A. We apply the rules pertaining to yard limit boards in connection with the switching on this industrial spur.

Q. In other words, is or not a train on the spur always in yard limits if there are yard limits?

Mr. Willmarth: Same objection last urged.

The Court: Have to overrule the objection.

A. Definitely so.

Q. With reference to yard limits, what is the difference between an industrial spur track and a branch line?

Mr. Willmarth: Same objection last made and for the further reason it calls for a comparison.

The Court: Overrule the objection.

A. A spur track is a track with a switch on one end, stub end on the other. And usually springs from a main line or from a branch line to serve some industry. A branch line is a short main line over which regular

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my trains are operated to serve the public in general, and there are located on this line one or more stations and other tracks to serve the public in general.

Q. What is the difference, with reference to the yard limits, between an industrial switch and a branch line?

Mr. Willmarth: Same objection last urged.

The Court: I'll have to overrule the objection.

A. When you are on an industrial spur you are still within yard limits, but if you go off on a branch line you definitely leave the yard limits and enter another main line.

Q. Coming to the question of these claims—we have in evidence two of them—when the conductors made these claims for pay on days that they claimed additional compensation for services performed, how were the time tickets filed? What was the practice?

A. There is a regular service time ticket filed for the run as advertised, paying the crew one hundred miles, which is guaranteed, plus any overtime at the rate of time and a half. And in the Pregnall case a supplemental time ticket was filed claiming an additional 100 miles for switching on this industrial track.

Mr. Barnwell: We offer in evidence photostatic copies as Exhibit 13 of the tickets for regular service trips carrying thereon, in addition to a minimum day, overtime claims on days that the industrial track was switched as follows:—You might look over these. Here are the originals.

(Documents were handed to Mr. Willmarth.)

Mr. Willmarth: We have no objection to the exhibit being filed. They are regular tickets.

Mr. Barnwell: We offer in evidence as Exhibit 13, photostatic copies of time tickets for regular service

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trips which carry thereon, in addition to a minimum day, overtime claims on days that the industrial track was switched as follows: September 7, 1944; September 9, 1944; October 24, 1944; October 26, 1944; October 28, 1944; October 30, 1944; October 31, 1944; November 4, 1944; November 16, 1944; November 28, 1944; November 30, 1944; December 4, 1944; December 7, 1944; December 9, 1944; December 14, 1944; December 21, 1944; December 23, 1944; December 26, 1944; January 27, 1945; February 27, 1945; March 8, 1945; March 15, 1945; March 17, 1945; June 7, 1945; June 21, 1945; June 23, 1945; June 28, 1945; July 12, 1945.

(The documents referred to were received in evidence and marked Plaintiff's Exhibits 13-A; 13-B; 13-C; 13-D; 13-E; 13-F; 13-G; 13-H; 13-I; 13-J; 13-K; 13-L; 13-M; 13-N; 13-O; 13-P; 13-Q; 13-R; 13-S; 13-T; 13-U; 13-V; 13-W; 13-X; 13-Y; 13-Z; 13-AA; and 13-BB, respectively.)

(Short recess.)

After recess.

Mr. Barnwell: We now offer in evidence as Exhibit 14, tickets which claim an additional day's pay for alleged side trip, Pregnall to Harleyville and return. First, those on which overtime was claimed, or regular service time tickets, and then those that were filed but which do not claim overtime. We have already offered in evidence, as Exhibits 1 and 4, the first two tickets that were filed for September 7 and September 9, 1944. These are the remaining tickets: October 24, 1944; October 26, 1944; October 28, 1944; October 30, 1944; October 31, 1944; November 4, 1944; November 16, 1944; November 28, 1944; November 30, 1944; Decem-

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ber 4, 1944; December 7, 1944; December 9, 1944; December 14, 1944; December 21, 1944; December 23, 1944; December 26, 1944; January 27, 1945; February 27, 1945; March 8, 1945; March 15, 1945; March 17, 1945; June 7, 1945; June 21, 1945; June 23, 1945; June 28, 1945; July 12, 1945. Now, we go on with those on which overtime was not claimed but an extra day was claimed: October 21, 1944; November 2, 1944; November 14, 1944; December 2, 1944; December 12, 1944; December 28, 1944; December 30, 1944; January 2, 1945; January 20, 1945; February 22, 1945; June 26, 1945; July 14, 1945.

(The documents referred to were received in evidence and marked Plaintiff's Exhibits 14-A; 14-B; 14-C; 14-D; 14-E; 14-F; 14-G; 14-H; 14-I; 14-J; 14-K; 14-L; 14-L.1; 14-M; 14-N; 14-O; 14-P; 14-Q; 14-R; 14-S; 14-T; 14-U; 14-V; 14-W; 14-X; 14-Y; 14-Z; 14-AA; 14-BB; 14-CC; 14-DD; 14-EE; 14-FF; 14-GG; 14-HH; 14-IH; 14-JJ; 14-KK, respectively.)

Q. I hand you these Exhibits 13 and 14. I notice that on both the original time tickets, that is, Exhibit 13, and on the supplemental time tickets, that is, Exhibit 14, the reference both as to overtime and as to additional pay claimed refers to it as a trip from Pregnall to Harleyville—if you will look on the back. Does that refer to this switching trip to the Ancor plant?

A. Yes, sir.

Q. Was there in fact any business of any sort done at Harleyville?

Mr. Willmarth: That is objected to as immaterial and irrelevant.

The Court: I'll have to overrule the objection.

A. No, sir.

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Q. That was usually referred to as Pregnall to Harleyville? Is that the way it comes to you, written that way?

A. Yes, sir.

Q. As a matter of fact, it was really Pregnall to Anchor Corporation; is that right?

A. That was the work that was done.

Q. And there was no stop or any business at Harleyville on any of those days?

Mr. Willmarth: Objected to as immaterial, irrelevant, and incompetent.

The Court: Overrule the objection.

A. No, sir.

Q. Take Exhibits 1 and 4, Exhibit 13, and those portions of Exhibit 14 that I have handed you and tell me whether they correspond day for day all the way through.

Mr. Willmarth: Your Honor, it is objected to. It is too indefinite to determine what the question is or the answer desired; for the further reason that it calls for the conclusion and opinion of the witness, the claims themselves being the best evidence.

The Court: I'll have to overrule the objection.

A. Yes, sir; they correspond.

Q. In other words, you have there as Exhibit 13 tickets for regular service trips; and also look now and see if all of those service trip tickets show a claim for overtime.

Mr. Willmarth: Same objection last urged; and for the further reason it is immaterial and irrelevant and foreign to any issue in this case.

The Court: I'll have to overrule the objection.

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m A. On all the regular service tickets submitted overtime was claimed and paid.

Q. On Exhibits 1 and 4 and 14—that is the other group I gave you—what are they?

Mr. Willmarth: Objected to for all the reasons heretofore urged.

The Court: Objection overruled.

Q. Referring now to the Exhibits 1 and 4 and Exhibit 14, they show a claim for an extra full day's pay for those same days; is that correct?

m Mr. Willmarth: Objected to for all the reasons heretofore urged.

The Court: Objection overruled.

A. These supplemental time tickets, which correspond in date to other exhibits of the regular service tickets, are tickets claiming an extra day's pay for switching the industrial track from Pregnull to the Ancor Corporation plant.

m Mr. Willmarth: I move to strike that part of his answer "for switching at the Ancor Corporation plant" at the conclusion of the witness's statement, as not responsive to the question, and for the further reason the time claims themselves are the best evidence of what the claims were for.

The Court: Objection overruled.

Q. You say that with reference to that first batch, Exhibit 13, those were paid? That is, the day and the overtime, they were paid?

A. All of those.

m Mr. Willmarth: Objected to for all the reasons heretofore urged.

The Court: Objection overruled.

A. Day's pay and overtime, as claimed.

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Q. The supplemental tickets, you call them, are claiming an extra day's pay for those same days? Is that right?

A. Yes, sir.

Mr. Willmarth: Same objection last urged.

The Court: Objection overruled.

Q. I hand you the balance of Exhibit 14, being Exhibit 14-Z through K'K. Those are for what?

Mr. Willmarth: Objected to for all the reasons heretofore urged.

The Court: Objection overruled.

A. These tickets, supplemental tickets marked 14-Z—

Q. That is all right—I have already identified them. They are for what?

A. Are tickets claiming one extra day's pay for making a side trip from Pregnall to Harleyville and return.

Q. And there is no overtime claimed on any of those?

Mr. Willmarth: Same objection last urged.

The Court: Overruled.

A. No, sir; no overtime claimed on these.

Q. But were these conductors actually paid by the Southern Railway for those trips on the regular tickets?

Mr. Willmarth: Same objection.

The Court: Objection overruled.

A. Yes, sir.

Q. In other words, on all of these trips the conductors got their full day's pay based on their own time cars; is that right?

Mr. Willmarth: Same objection.

The Court: Overruled.

A. Yes, sir.

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Q. Similar to these?

A. Yes, sir.

Mr. Willmarth: Same objection.

The Court: Objection overruled.

Q. You have already testified about the other, with reference to it being called from Pregnall to Harleyville. That is, nevertheless, an expression which meant the switching of Ancor track or not?

Mr. Willmarth: Objected to as calling for the conclusion and opinion of the witness—

Q. Is that the same situation that exists there?

Mr. Willmarth: Foreign to any issue in this case and in no manner binding on this defendant.

The Court: I'll have to overrule the objection.

A. That is the way it is expressed on the time tickets by the conductors who submitted the claims for this extra day's pay, but what was actually performed was switching on the industrial spur serving the Ancor Corporation. No switching or work at all was performed at Harleyville.

Q. Referring to Exhibit 13, that is, the photostatic copies of the tickets for regular service and overtime—

Mr. Willmarth: Same objection last urged.

Mr. Barnwell: I haven't finished the question.

Mr. Willmarth: Excuse me.

Q. What is given on those tickets as the reason for delay and basis of the claim for overtime.

Mr. Willmarth: Objected to. The exhibits themselves are the best evidence.

The Court: Objection overruled.

A. On the back of all regular service tickets, conductors rendering such tickets are required to report in columns indicated delay report. And on each ticket

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is indicated time consumed going out on industrial spur from Pregnall to the Ancor Corporation plant. For example, on a ticket dated September 7, conductor stated that he consumed one hour twenty minutes going to Harleyville and return. On the next ticket, dated September 9, he stated that he was delayed one hour five minutes going to Harleyville and return. And shall I name—

Q. Go ahead and read them all.

A. On October 24, one hour thirty minutes consumed going to Harleyville. October 26, one hour forty-five minutes going to Harleyville. October 28, three hours going to Harleyville. October 30, three hours and thirty minutes going to Harleyville. October 31, one hour five minutes going to Harleyville. November 4, one hour ten minutes going to Harleyville. November 16, one hour ten minutes going to Harleyville. November 28, two hours going to Harleyville. November 30, one hour and ten minutes going to Harleyville. On December 4, there was no delay shown going to Harleyville on that day. On December 7, one hour and ten minutes consumed going to Harleyville. On December 9, two hours and twenty-five minutes going to Harleyville. On December 14, one hour and twenty minutes going to Harleyville. December 21, one hour and ten minutes going to Harleyville. December 23, no time listed as going to Harleyville. On December 26, one hour ten minutes going to Harleyville. All dates just read were during the year 1944. The following dates are in 1945. January 27, one hour five minutes going to Harleyville. February 27, one hour fifteen minutes going to Harleyville. March 8, no time shown going to Harleyville. March 15, one hour consumed going to

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Harleyville. March 17, one hour and fifteen minutes consumed going to Harleyville. On June 7, fifty-five minutes consumed going to Harleyville. On June 21, one hour consumed going to Harleyville. June 23, one hour and fifteen minutes apparently—it is not very plain—going to Harleyville. June 28, one hour consumed going to Harleyville. On July 12, fifty minutes going to Harleyville.

Q. As I understand, with reference to those which you have read but did not show overtime for Harleyville, they did show overtime for those dates?

Mr. Willmarth: Objected to as immaterial and irrelevant.

Q. But not for Harleyville?

A. On the regular service tickets, eight hours were paid plus overtime accrued on that day.

Q. And all of those—

The Court: One moment.

Mr. Willmarth: May it be understood my objection preceded the answer.

The Court: Objection overruled.

Q. All of those tickets you have in your hand show claims for overtime which was paid; is that correct?

Mr. Willmarth: Same objection last urged, and for the further reason the tickets are the best evidence; and in no manner binding on this defendant.

The Court: Objection overruled.

A. Yes, sir.

The Court: There are one or two of those tickets that didn't claim any overtime.

Mr. Barnwell: For this particular movement. I am bringing out now they do claim overtime.

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Q. In other words, all of the tickets which you hold are claims for overtime and overtime was paid? 293

Mr. Willmarth: Objected to for all the reasons heretofore urged.

The Court: Objection overruled.

A. Yes, sir.

Q. And those you referred to as not showing Pregnall merely mean they didn't claim overtime for that Pregnall movement? 294

Mr. Willmarth: Same objection.

The Court: Overrule the objection.

A. It meant that they did not indicate on the back of the time table any delay on account of going to the Ancor Corporation plant.

Q. All of those claims for one hour and fifty-five minutes and so on, were made by the conductors themselves and paid by the railroad based on these tickets?

Mr. Willmarth: Objected to as the witness has not shown himself qualified to testify as to whether the conductors were paid.

The Court: Objection is overruled. 295

A. Yes, sir.

Q. And these claims are all for a full day's work for that same overtime; is that right?

Mr. Willmarth: Objected to as calling for the conclusion and opinion of the witness, and the claims themselves being the best evidence, and in no manner binding on this defendant.

The Court: Objection will have to be overruled.

A. Yes, sir.

Q. Exhibit 13 is what you have there, isn't it? 296

A. Yes, sir; 13.

Q. Refer to the ticket dated December 9, 1944—

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197 The Court: Mr. Barnwell, I'm afraid we'll have to recess.

Mr. Barnwell: We can't get through with this witness for some little time.

The Court: We'll start again at three o'clock.

(Recess until three o'clock p. m.)

Afternoon Session

(The trial was continued.)

199 Mr. Willmarth: Your Honor, in the interest of expediting the trial, counsel for the defendant will be agreeable to a stipulation by which our objections could stand for evidence in similar character without repetition. I have prepared a suggested stipulation here which I will be happy to read for the approval of counsel.

The Court: All right; do that.

200 Mr. Willmarth: It is stipulated that all objections heretofore urged by counsel for the defendant may stand without necessity for repetition as to all similar evidence; and further, that all evidence relating to the opinion of the witnesses as to interpretation of past practices of the schedule, rules, and contracts between the defendant and plaintiff may be understood as being subject to the objection that it is not the best evidence, immaterial, and not tending to prove practice and custom; and also that all evidence relating to side trips, or so-called industrial switching operations on the Southern Railway, may be understood as being subject to the objection of the defendant as immaterial, irrelevant, and not tending to prove established custom and practice relative to the issue in this case, and not binding on the defendant. This stipulation is made

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solely for the purpose of eliminating the necessity of repeated objections by the defendant. If that is agreeable to counsel, we'll be glad to stipulate.

Mr. Barnwell: I don't think, your Honor, we are called on to stipulate. Your ruling on it will be effective without any stipulation, if your Honor to save time is willing to let him consider objections made without having to make them every time is perfectly satisfactory. But I don't think we ought to enter in any stipulation on the record.

The Court: What we usually will do in our South Carolina practice is for an attorney to say he would like to have it noted that he objects to all similar testimony, and the judge then rules he will consider the objection to all similar testimony and make the same ruling that he has made in other similar objections.

Mr. Willmarth: Very well. My objections heretofore made stand as to all similar testimony.

The Court: My ruling will be the same. Naturally, I'll have to overrule the objection. If at any time you think it better to make a special objection, why there is no harm; go ahead and do it.

FRANK B. BIRTHRIGHT, resumed the stand and testified further as follows:

Direct Examination

By Mr. Barnwell:

Mr. Barnwell: Strike the last question.

Q. Mr. Birthright, I understood you to say in connection with your testimony concerning these exhibits, that there were three of the regular tickets—that is, Exhibit 13, ticket for December 4, December 23, '44, and March 8, '45—I understood you to testify that on

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406 those three tickets there was no claim for overtime for work on the Pregnall industrial switch; is that correct?

A. There is no claim for an extra day's pay for going to the Ancor Corporation plant.

Q. I am referring now to Exhibit 13, which are the regular tickets. Look in the upper corner of Exhibit 13.

A. They do not show on these dates that they went to Ancor Corporation.

Q. Do they or not show claims for overtime?

406 A. On all three days overtime was accrued and paid for.

Q. What was the overtime on each day?

A. On December 4, 1944, one hour and fifty-five minutes overtime.

Q. Look on the back of that and see where that overtime was said to have accrued.

407 A. The conductor reported only two delays on this particular day. Switching at Branchville, two hours and fifty-five minutes, and switching at Summerville; fifty-five minutes. On December 23, six hours and twenty minutes overtime was made and paid for.

Q. What do the records show on the back?

408 A. On the back it shows that they were delayed at Eight Mile, switching twenty minutes. I wish to correct that. He was delayed twenty minutes at Eight Mile by Extra Train 745. He was delayed at Eight Mile one hour by No. 52. He was delayed at West End forty-five minutes by First No. 12. He was delayed at Ridgeville ten minutes by Extra 4598. He was delayed at Dorchester twenty-five minutes by Second No. 12, and at St. George forty minutes by No. 11.

Q. And no claim for overtime for the Pregnall switching?

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A. No.

Q. Now then, March 8, 1945.

A. On March 8, 1945, twenty minutes overtime was made and paid for and we have no delay at all showing where he went on that particular day.

Q. Will you refer to Exhibit 14 for those same dates—or do you find those same dates in Exhibit 14? First, December 4, 1944; how much overtime is claimed and for what?

A. This time ticket is a supplemental ticket claiming additional time for making side trip from Pregnall to Harleyville and return, distance of 13½ miles, and the claim involved eight hours straight time plus one hour and fifty-five minutes overtime.

Q. One hour and fifty-five minutes overtime is claimed with reference to the Pregnall switching on that ticket?

A. Yes, sir.

Q. Will you refer to the one of December 23?

A. On this particular date a supplemental ticket was submitted for payment for making a side trip to Harleyville and return, claiming a straight day's pay of eight hours plus an additional six hours and twenty minutes overtime at time and a half.

Q. With reference to March 8, 1945.

A. On this date a supplemental time ticket was submitted claiming 100 miles from Pregnall to Harleyville alumina plant and return, and in the lower left-hand corner under "Delayed Time Claimed," they claimed only fifty minutes.

Q. You say that says "Harleyville alumina"?

A. Yes, sir; to the Harleyville alumina plant.

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Q. As a matter of fact, Harleyville and Harleyville alumina plant, or any such designation, refers to what? What is the actual name?

A. It is the Ancor Corporation.

Q. And all those switching movements were actually to the Ancor Corporation?

A. There was never any switching done at Harleyville.

Q. I say, all were at the Ancor Corporation?

A. Yes, sir.

Q. If you will put those back in their order now, we'll refer to them again. Will you look at this Plaintiff's Exhibit 13, for December 9, 1944? At the time of this action, what was the conductor's day's pay? What was the amount of his day's pay for regular time?

A. Nine dollars ten cents.

Q. Overtime per hour was what?

A. One dollar seventy-one cents.

Q. Taking that ticket, how much overtime does that show?

A. Two hours overtime.

Q. So that would make it actually paid for that day how much?

A. Twelve dollars and fifty-two cents.

Q. And that was what was paid?

A. Yes, sir.

Q. Of course, we are discussing now the rate of pay in existence at that time. The present rate of pay is higher than that?

A. Considerably higher, yes, sir.

Q. That is \$12.52. Assuming, which we will undertake to prove later, that 313 days to be the number of

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working days in a year, what would that amount to per year? 417

A. Three thousand seven hundred thirty-seven dollars.

Q. Subject to correction?

A. Yes, sir. I was trying to do it in my head. It is really more than that. It is about \$3,918.00.

Q. I think you have testified that there is in Exhibit 14 a supplemental ticket claiming a full day's pay for that same day, December 9?

A. Yes, sir; that is correct. 418

Q. A day's pay is how much, did you say?

A. Nine dollars ten cents on the schedule.

Q. He is claiming an additional \$9.10. He has already been paid how much, you just testified?

A. Twelve dollars fifty-two cents. One straight day plus two hours overtime.

Q. So that if this claim had been allowed, his pay for that day would have been how much?

A. Would be \$21.62.

Q. And taking 313 days as a year's work, what would that amount to? 419

A. Six thousand seven hundred sixty-seven dollars.

Q. The crew on each of these trains consisted of whom?

A. Consisted of an engineer, fireman, conductor, brakeman, and flagman.

Q. The same rule would apply to each of those other organizations as conductors?

A. In proportion and based on the rates of pay that they are now being paid.

Q. Looking at that blueprint, Mr. Birthright, explain just what is the movement, what was the movement, 420

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Q. what always has been the movement, at Pregnall when the train is required to switch the industrial plant of Ancor Corporation?

A. The cars are brought to Pregnall from Columbia. They are sometimes brought by through train and sometimes by local but mostly by through trains, and the through train sets these cars in on the Pregnall spur. There may have been times when the cars were set off in the south end of the passing track there. But in both cases the switching of the plant would be conducted in the same manner. Assuming that the cars are set off by a southbound train in the Pregnall spur, the local going toward Branchville will throw the switch and head in this track, cars ahead of the engine. He has instructions from the chief dispatcher how they want the cars placed at the Ancor plant. After the caboose clears over the highway there and also of the main line, the engine is then cut off and these cars are pushed ahead of the engine on out to Ancor Corporation plant and placed in accordance with the instructions issued the conductor by the chief dispatcher. He may have loads to place and bring out or he may have empties to place or bring out, whichever may be the case. In returning to Pregnall the cars are still ahead of the engine. He comes back, couples up to his train, shoves out on the main line toward Charleston. He then pulls up to what we call the west end of the passing track, but on this print it would be north, and he drops these cars by him on the balance of this train; if he doesn't have too many cars. It is not safe to do it if you have too many. And if there are too many, it had been customary then to take his entire train over to the next station toward Branchville, known as Byrds.

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which is a track with a switch on both ends of it. These cars were shoved in the clear at Byrds, the engine was then cut off and he would go to the north end of the track and pick them up behind his engine. In other words, he ran behind his cars, came back to the main line, coupled up to the rest of his train and continued on his trip to Branchville.

Q. You were the superintendent when this industrial track was constructed by the defense plant corporation?

A. Yes, sir.

Q. Was any service performed by the local trains on the local trains on the track while it was being constructed?

A. Yes, sir.

Mr. Barnwell: We offer in evidence as Exhibit 15, time tickets for trips on certain dates, which I will give, from September 24 to December 6, 1943. We are offering photostats. Exhibit 15, time tickets: September 24, 1943; September 25, 1943; September 27, 1943; November 5, 1943; November 8, 1943; November 12, 1943; November 17, 1943; November 18, 1943; December 6, 1943.

(The documents referred to were received in evidence and marked Plaintiff's Exhibits 15-A; 15-B; 15-C; 15-D; 15-E; 15-F; 15-G; 15-H; and 15-I, respectively.)

Q. Referring, Mr. Birthright, to the first one there, September 24, 1943, just what is that time ticket for and what does it claim? Is that a regular time service ticket?

A. Yes, sir. It is a regular time service ticket.

Q. Made out by whom?

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A. Made out by Conductor M. S. Dewitt.

Q. And what is it for?

A. This is a regular service trip from Charleston to Andrews Yard.

Q. Where is Andrews Yard?

A. Andrews Yard is a freight yard at Columbia.

Q. Go ahead.

A. The distance from—

Q. Just tell me what is on the ticket. What is it?

A. Well, they are claiming—the time paid, rather, was ten ~~hours~~ and fourteen minutes, which is the running time between Charleston and Columbia, since it is over 100 miles. And in addition to that, they were paid five hours and one minute overtime for making this trip.

Q. That ticket was with reference to the runs before the change was made on June 14, 1944?

A. That is correct.

Q. In other words, at that time that train was running where?

A. At that time we had established daily, except Sunday, local freight service between Charleston and Andrews Yard, which is the yard at Columbia.

Q. And that is the pay ticket claiming regular day's pay and overtime on that day's run from Charleston to Andrews Yard?

A. That is correct; yes, sir.

Q. Does that show whether any of that overtime accrued because he performed services at a plant, at Ancor Corporation, at Pregnall?

A. Yes, sir. This time ticket in his delay report showed that he was delayed from 9:50 a. m. to 1:45 p. m. unloading ballast on this track.

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Q. Was any claim ever made for additional day's pay for performing that work at Pregnall?

A. No, sir.

Q. Take the next one, September 25, 1943. Explain that.

A. This is a regular service ticket submitted by Conductor J. E. Pearce on September 25, 1943, on which date the local made a trip from Charleston to Andrews Yard. The straight time paid, based on twelve and a half miles per hour, was ten hours and fourteen minutes, plus five hours and eleven minutes overtime.

Q. Does that ticket show any time spent at Pregnall, and how much?

A. This time ticket showed that—

Q. I mean, working at Pregnall.

A. Yes, sir. The actual time consumed unloading ballast on that day was two hours and fifty minutes.

Q. That with reference to this?

A. Unloading rock only. And then there was one hour and ten minutes on the switching. But that is not broken down to show whether it was actually switching the ballast cars or on some other.

Q. It does show there was time consumed in switching at the Pregnall industrial track?

A. Yes, sir; that is right. In other words, the total delay at Pregnall was from 9:45 a. m. to 1:45 p. m., and the conductor has it broken down, one hour and ten minutes switching and two hours and fifty minutes unloading rock.

Q. Has any additional day's pay been claimed for performing that work at Pregnall on that day?

A. No, sir.

Q. Look at the rest of those tickets. What are they?

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A. All these other tickets are regular service tickets paid in accordance with the contract for the movement of local from Charleston to Andrews Yard at Columbia.

Q. Is overtime claimed on all those tickets?

A. Yes, sir; overtime is claimed. Overtime was claimed and paid on every ticket.

Q. Does it show whether work was done at this industrial switch at Pregnall as part of the claim for overtime? Just read what is said in each case about Pregnall.

A. All right, sir. On September 27, 1943, it does not show that any work was performed out there. On November 5, the delay report on back of service ticket shows that the local consumed from 10:00 a. m. to 1:45 p. m., unloading ballast. On December 8, a delay of fifteen minutes was shown working there. On November 12, from 9:35 to 3:00 p. m., was consumed unloading ballast. On November 17, at Pregnall, forty minutes was consumed in switching, four hours and thirty going to Harleyville. On November 18, two hours thirty minutes consumed switching, three hours unloading ballast. And on the 6th of December 1943, from 9:00 a. m. to 1:55 p. m., consumed unloading ballast.

Q. All of those had reference to operations on this industrial track at Pregnall?

A. All of the stone that was unloaded.

Q. I say, all that you read out?

A. Was consumed in the construction of the track to the Ancor Corporation plant.

Q. And whether it said "Harleyville" or "Ancor plant", or anything else, it was simply a switching

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operation, unloading ballast for the construction of the track? 441

A. That is correct, sir.

Mr. Barnwell: Your Honor, this one for September 27 which has no reference to Pregnall was gotten in here by mistake. I would just like to withdraw it.

Mr. Horlbeck: This same run?

Mr. Barnwell: On the same run but it has no reference to this Pregnall situation. It got in there by error. It is a record of time ticket but just doesn't refer to Pregnall and therefore I am willing to admit it is irrelevant. 442

Mr. Horlbeck: We won't object.

(The document heretofore marked Plaintiff Exhibit 15-C and received in evidence was withdrawn.)

Q. Were any time tickets filed for additional day's pay on any of those days that work was performed on the Pregnall industry track?

A. No, sir.

Q. The first one is the one we put in evidence, September 7, 1944? 443

A. Yes, sir.

Q. Are all of those tickets that I just handed you, they were put in while you still were running 60 and 61 from Charleston to Columbia and from Columbia to Charleston?

A. Yes, sir.

Q. Was any complaint ever made because the service to be required on this industrial track at Pregnall was not mentioned in the bulletin establishing run from Charleston to Branchville? 444

A. No, sir.

Q. What is your answer? 445

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Q. There were no complaints because it was not put in the bulletin.

Q. When the bulletin was put out on June 4, did the employees know when that job was bulletined that they would be required to switch this plant at Pregnall?

A. Apparently so because they had been going out there prior to issuance of this bulletin.

Q. They had been doing it on their own run right along?

A. Yes, sir.

Q. Are the crews on this local freight still performing the services at this Ancor Corporation plant, industrial switching there?

A. Yes, sir.

Q. Are they still filing claims for an extra day for performing such service in addition to their regular pay for the service trip?

A. Yes, sir.

Q. Are any of the claims being paid?

A. No, sir.

Q. All of those claims are being declined?

A. Yes, sir.

Q. I notice on these time tickets they refer sometimes to Extra 817 west, Extra 817, 606, I think as a train and sometimes 61. Will you explain, referring to that bulletin, what it means with reference to Trains 60 and 61 and what bearing that has on these particular tickets which designate the train sometimes Extra so and so, with various numbers.

A. Well, prior to the issuance of this bulletin we had what was known as daily local freight service, except Sunday, between Charleston and Columbia. The local

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business fluctuates such that it becomes necessary at times to change the local freight operation overnight.

Q. Before we come to that. This local freight service between Charleston and Columbia, what was the train leaving Columbia known as on the time table?

A. No. 60.

Q. And the train from Charleston to Columbia was known as what?

A. Sixty-one.

Q. How would those trains run?

A. Well, for example, on Monday morning No. 60 would start out of Andrews Yard for Charleston and another train crew would start out of Charleston on No. 61 for Andrews Yard.

Q. You mean the other way around. One would start from Charleston and one would start from Columbia?

A. That is correct. No. 60 out of Andrews Yard and 61 out of Charleston. And the next day they would go back on a straightaway local run. The crew going into Charleston on 60 would return to Columbia with 61, and vice versa for the other crew.

Q. So No. 60 carried a crew from Columbia to Charleston?

A. Yes, sir; that is right.

Q. And No. 61 carried a crew from Charleston to Columbia?

A. That is right, sir.

Q. And that operated how often?

A. Daily except Sunday.

Q. Go ahead.

A. Because of the heavy industrial switching over the entire line it became necessary for us to re-establish a different type of local service between Charles-

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ton and Columbia; and in order to provide more time for the crews to get in within the 16-hour law, we made the service tri-weekly between Charleston and Branchville, Branchville and Andrews Yard, with a Sunday layover at Branchville and at Andrews Yard. In other words, on Monday morning tri-weekly local would start out from Andrews Yard to Branchville and also from Branchville to Charleston. The next morning the local on the east end of the road, that is, at Charleston and Branchville, would then go back to Branchville and Andrews Yard. That would alternate every day except on Sunday. And the Sunday layover would be under that bulletin at Branchville and at Andrews Yard.

Q. So that No. 60, which was the train which went from Columbia to Charleston—that is right, isn't it?

A. Yes, sir.

Q. No. 60, which went from Columbia to Charleston, became the train that went from Columbia to Branchville, spent the night there as stated in the bulletin, and the same crew took a train back to Columbia, is that right?

A. On the following morning, yes, sir.

Q. And similarly with reference to 61; originally its crew went all the way from Charleston to Columbia?

A. We had the same arrangement on this end, too.

Q. In other words, the crew would start at Charleston, go to Branchville, spend the night there, and ride another train back the next morning?

A. That is correct, sir.

Q. As I say, on the bulletin it says No. 60. On most of these time tables it calls them Extra No. 817 or 656, or something of that sort. Just explain—is that the same train mentioned in that bulletin?

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A. Well, for the convenience of operation the dispatcher operated those locals as extras. In other words, they are designated by the engine number. If the engine pulling the train is No. 817, it would be designated as Extra 817 east or west, depending on the direction it is going in.

Q. But that would be the same run?

A. Same run. That was done for the convenience of the dispatcher.

Q. So that those numbers used in the bulletin for the purpose of identifying the well known No. 60 and 61 rather than to indicate any special number for a train, is that right?

A. That is correct; as all local freight trains are usually designated between 60 and 70.

Q. And you have even numbers in one direction?

A. It was purely for identification reasons only.

Q. So that those time cards referring to Extra 817, or whatever it may be, refers to this same run which we are talking about?

A. Are really Trains 60 and 61, yes, sir.

Q. As I undersand, in railroad practice you have a number for a train and you will cancel that number and put an extra on—you do anything like that?

A. The train would be designated as 817 east if the engine number is 817. If it was Engine 4500, then it would be Extra 4500 east or west, north or south, whatever the condition may be.

Q. It would take the place of 60 or 61?

A. Yes, sir; that is right.

Q. With reference to your local freight schedules when published in your timetables, just explain how

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Q that is handled in actual practice with reference to local freights.

A. The local freight business fluctuates so much that it is not the practice to issue a new timetable just to take care of a condition that may be only temporary. A new issuance of the timetable is because of change in passenger schedules where the public has to be informed, and in accordance with the rules of the South Carolina Public Service Commission. And when passenger train schedules are changed it becomes necessary to issue a new timetable. But in case of local freight service a change might be made over night. So consequently, we'll make the change and then operate the trains if it can be done on the schedules shown in the table. If it can't, then we'll run the trains as an extra. And that is the way it is done.

Q. Have you since you have been there had occasion frequently, or more than one occasion, to change your local freight operations and schedules?

A. Yes, sir. At one time we operated daily service except Sunday between Charleston and Andrews Yard. Then during the depression years it became necessary to make reductions and we operated tri-weekly service between Columbia and Andrews Yard, except Sunday. In that particular instance the local No. 60 operated from Andrews Yard to Charleston and on that particular day No. 61 was annulled. The following day we operated No. 61 from Charleston to Andrews Yard and the dispatcher annulled No. 60, and so on and on. And then as business picked up we then re-established the daily service between Charleston and Columbia, except Sunday, and when industrial switching picked up and became so heavy that we had to make other

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changes we then established tri-weekly service between Branchville and Charleston and Branchville and Columbia, as has been explained heretofore.

Q. Those changes that you make are sometimes permanent and sometimes temporary?

A. As a general rule, they are made on a temporary basis. But if the business continues to hold up that would justify it, we would then change the schedules in the timetable to meet the conditions.

Q. On the other hand, if the business fell down you would keep operating it the same way?

A. Yes, sir; that is correct.

Q. With reference to this change which was bulletined on June 4, what were the circumstances under which that change was made?

A. The change was made because of the increased volume of business that the locals were having to handle and they couldn't make the run all the way from Charleston to Columbia and from Columbia back to Charleston within the 16-hour law. And that was the reason for making the change.

Q. At the time you made the change could you or not tell whether it was going to be permanent?

A. Business at that time was fluctuating so that we did not make the changes in the timetable, thinking any day we may go back to the old arrangement.

Q. So that your timetable, so far as local freight service, does not necessarily indicate the actual schedules being operated?

A. In no way whatsoever.

Q. In your timetable which is effective June 11, 1944, you show 60 and 61—or, look at this time table.

(Document handed the witness.)

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Mr. Horlbeck: That No. 77?

Q. (By Mr. Barnwell) No. 77?

A. Timetable No. 77, yes, sir; effective 12:01 a. m., Sunday, June 11, 1944.

Q. That shows the 60 and 61 running from Charleston to Columbia and from Columbia to Charleston?

A. Yes, sir.

Q. And on June 4 you put out this bulletin effective June 12?

A. Yes, sir.

Q. Which put out a different schedule?

A. Yes, sir; that is correct.

Q. Just explain how that came about.

A. Well, prior to the issuance of the bulletin we had this daily local service, except Sunday, and when we made the tri-weekly—

Q. How long before that timetable was gotten out did you have to furnish the information in order to make it up?

A. Well, the timetable was effective 12:01 a. m., June 11.

Q. That is the day it was mailed from Washington?

A. No, sir. It was made up prior to that in Washington.

Q. I say, how long before that was out did you have to give the information as to your freight service schedule?

A. The assignments to the bulletin were up, I think, on the 12th; I believe it was the 12th of June.

Q. I am asking, Mr. Birthright, about this timetable here that you have in your hand. How long before that timetable was published did you have to furnish Washington with the necessary information?

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A. Oh, I see.

Q. Concerning your freight schedules.

A. This particular timetable was issued because there was a change in other schedules, not the local freight schedules. And the information, the transcript for this timetable, had to be submitted about a month before it became effective.

Q. At the time that that information was furnished, had you or not decided to make this change in the 60 and 61?

A. The information causing this table to be published in Washington was already in Washington when we made the decision to make the change in the local freight service.

Q. And it wasn't necessary for you at the last minute to give them information to change it for the reasons you have already stated; is that right?

A. That is right; because of the business fluctuating so and not knowing how long it was going to become effective.

Q. As a matter of fact, has that operation from Charleston to Branchville and from Columbia to Branchville continued?

A. Yes, sir.

Q. And do you in your latest timetable show that as the schedule for these trains?

A. Yes, sir. We have assigned schedules to them, feeling confident that the business would hold up, and we issued a timetable, No. 80, that would show trains 61 and 60 between Charleston and Branchville, and trains 62 and 63 between Branchville and Andrews Yard.

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Q. As I understand, you don't make those changes in your permanent timetable until you are reasonably certain it is going to be permanent?

A. Feeling confident that the business was going to hold up, we made the changes accordingly.

Cross Examination

By Mr. Willmarth:

Q. This run from Charleston to Columbia had existed for some years, had it not, prior to the split in the run which you have discussed on June 11, 1944?

Mr. Barnwell: June 12.

A. What date did you mention, sir?

Q. I refer to a date, June 11, 1944. I suppose it would be effective June 12, '44, approximately that date.

A. Yes, sir; that is right.

Q. And prior to that date it had been in existence for some years, I believe you said, running from Charleston to Columbia?

A. Yes, sir.

Q. One crew up and that same crew came back the next day, and in the meantime another crew was coming the other way and then laying over and going back; is that right?

A. On a daily basis, except Sunday, yes, sir.

Q. At that time—and I am referring to June, 1944, and prior thereto—what was the basic daily pay for a conductor?

A. For eight hours was \$9.10.

Q. That was his basic day?

A. As far as I recall, yes, sir.

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Q. Excluding any overtime, what would be the pay for that conductor for one run from Charleston to Columbia under the old run, 128 miles?

A. Well, it would be—they'd be paid ten hours and fourteen minutes.

Q. Will you figure it out for the run?

A. His pay would be approximately \$11.70.

Q. Wouldn't you, or couldn't you, arrive at that pay, and don't you usually arrive at that pay simply by multiplying 128 miles, the length of the run, by the mileage rate shown in the schedule under Article 4 (b)?

A. Yes, sir. It can be worked out that way.

Q. Isn't that usually the method that is used in working pay except where overtime is involved?

A. That is right. That is correct.

Q. So that ordinarily we don't refer to hours except when overtime is involved, isn't that true, Mr. Birthright?

A. Yes, sir.

Q. In figuring pay for conductors?

A. Yes, sir.

Q. Ordinarily you figure pay by taking the total mileage run and multiplying it by the mileage rate except where the mileage is below 100 miles; isn't that correct?

A. That is right.

Q. And where it is over a hundred miles you merely take the mileage rate times the miles run to figure the pay where no overtime is involved?

A. That is right.

Q. On that run that we are discussing between Charleston and Columbia, of 128 miles, how many

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hours would that conductor have to work going one way on that run before he would start to accumulate overtime?

A. Ten hours and fourteen minutes.

Q. Suppose he made the run in ten hours. He would get, as you have stated, \$9.70, isn't that correct, or \$11.70?

A. I said \$11.70. That is approximate. Within a few cents.

Q. Suppose he made the run within four hours.

A. He would get the same amount.

Q. Eleven seventy?

A. Yes, sir.

Q. In other words, you would pay no attention whatever to hours?

A. That is right.

Q. He is paid by the trip?

A. That is right.

Q. And it wouldn't be until he had accumulated on a particular run time in excess of ten hours and fourteen minutes that you would begin to think of overtime accumulating; isn't that correct?

A. That is right.

Q. You had two crews, I believe you said on that run, one operating up and one operating back?

A. Yes, sir.

Q. And you cut the run in two and you have maintained the same number of crews, did you not?

A. Yes, sir.

Q. And one crew that used to run clear down now stopped at Branchville and laid over and ran back and the other crew did the same only the other direction?

A. On the other end, yes, sir; that is correct.

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Q. So that now instead of 128 miles, one crew runs from Columbia to Branchville, or a distance of 63 miles and the other crew runs from Branchville on, I take it, the remaining distance?

A. Approximately 65 miles.

Q. Will you referring to the same time and the same basic day, how much do you pay that conductor, excluding overtime in our calculations, for making that run from Charleston to Branchville?

A. Nine dollars ten cents.

Q. And, excluding overtime from our considerations then, there has been a saving to the Southern Railway, has there not, of approximately \$2.60 per each man?

A. Figuring it your way, it would be, yes, sir.

Q. Isn't that true, excluding overtime?

A. The only way to arrive at an accurate figure of what the savings or extra cost would be is to take the total cost for thirty days, considering the amount of overtime that was made on the old run and what is being made now and take the difference. That is the only way.

Q. Just the one run, there has been a saving each time?

A. Without any overtime, that is correct; yes, sir.

Q. Of \$2.60?

A. Yes, sir.

Q. And that is true, or approximately true, for each man on that crew, is it not?

A. No; because the rates of pay are different.

Q. I said approximately true.

A. Well, that is right; yes, sir.

Q. After this basic day pay of \$9.60, I think you said existed in June of 1944, what is the present basic daily rate?

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A. I don't know.

Q. For a conductor?

A. No, sir; I don't know.

Q. You are the superintendent of the Southern Railway and you don't know what the present daily rate for—

A. It is impossible for me to remember all those things. I have a table.

Q. You don't know whether these men have been paid that money or not, do you?

A. Yes, sir.

Q. You do?

A. Yes, sir.

Q. But you don't know how much they get in terms of basic pay?

A. If I want to find out I refer to the payrolls.

Q. Didn't you testify here that their pay was substantially higher now than it was in June, '44?

A. Yes, sir.

Q. How did you know that?

A. Because they have been given a number of increases since then.

Q. But you don't know how much it is, or anything?

A. Not in dollars and cents exactly, no, sir.

Q. Do you recall approximately the date that construction was begun on these tracks which I believe you identified here as Exhibit No. 11, this plat showing this track that runs out from Pregnall to the Ancor Corporation and the Volunteer Cement Company?

A. Some time in 1943.

Q. Some time in 1943?

A. Yes, sir.

Q. Prior to that time there was no track there, was there?

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A. No, sir.

Q. You have Exhibit No. 11 where you can refer to it, Mr. Birthright. That is the plat of the track from Pregnall to Ancor. Just for my information, referring you to the righthand corner of the plat. The plat depicts the Ancor Corporation and the Volunteer Cement Company and indicates that the track fans out there, does it not, one flange of it going over to the Ancor plant and the other, a Y, or part of the Y, fanning out around the cement plant; is that correct?

A. No, sir. There is no Y out there.

Q. Whatever you call it. I am asking if the track doesn't go out there and then fan out, according to your plat, Exhibit 11?

A. It is true that there is a track that springs off of the industrial spur of the Ancor plant which serves the Volunteer Cement Company.

Q. Then I ask you to refer to the Exhibit No. 11 and the little arrow running down from the words "Track of Volunteer Cement Company." Is that the track which you have just referred to as springing out and serving the cement company?

A. Yes, sir; that is right.

Q. Do you know how long that track is from the point where it springs out to the complete butt end of that track, as shown to the far right of Exhibit No. 11?

A. It is indicated on here, it is about 4610 feet.

Q. You are referring to the upper track around. The lower track which you identify I believe on your exhibit by the words "Track 'A' ", which runs by the Ancor plant, how long is that portion of that track from the point from the butt end of the track to the point where the track of the Volunteer Cement Company springs out from it?

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A. There is no way to tell that, but that track by itself is 175 feet long. That is what it indicates to me.

Q. Mr. Birthright, just for the moment, how far is Harleyville from this Ancor plant and cement plant up here again?

A. Approximately two miles.

Q. Approximately two miles. And that is looking in the direction from the plant on portion of Exhibit P1 marked "Ancor Corp. Plant," down in the direction toward Pregnall; is it not?

A. Yes, sir.

Q. So that these plants aren't really at Ancor at all, are they?

A. There is no such place as Ancor.

Q. I beg your pardon. At Harleyville?

A. No, sir.

Q. That is, they sit out there alone by themselves?

A. Yes, sir.

Q. Two miles beyond Harleyville?

A. Yes, sir.

Q. Turning on away from this for the moment; you have testified here to numerous claims and identified numerous claims made by the conductors on this run for an extra day for that side trip, have you not?

A. Yes, sir.

Q. Did you send those individual men, each of them, a declination declining to pay their claims on each and every one of those individual claims as they came into the company?

A. As far as I recall.

Q. That is, at least you meant to send them that and so far as you know you did send them?

A. As far as I know.

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Q. Showing that you declined the claim; is that correct?

A. Yes, sir.

Q. And then, I take it, Mr. Utsey contacted you and discussed the claims with you on behalf of these men, did he not?

A. Well, there are several organizations that I discussed labor matters with and we have had hundreds of discussions and I couldn't recall any particular one, no, sir.

Q. Let's go into that a minute. How many different organizations or representatives of organizations do you discuss claims with?

A. Well, with the engineers and firemen, conductors, trainmen, clerks, freight handlers, and some electricians out at the coal pier.

Q. How many organizations are represented on the Southern Railway?

A. Well, I don't know all those that are involved in the mechanical department.

Q. Generally, your—

A. There is quite a few of them.

Q. Your work has been with what has been known as the train service?

A. Train service organizations, yes, sir.

Q. And those were known as the conductors, trainmen, engineers, firemen, and switchmen?

A. That is right.

Q. Five train service brotherhoods?

A. Yes, sir.

Q. And ordinarily the railway conductors would represent conductors and ordinarily the Brotherhood of Railroad Trainmen would represent trainmen; and so on down the line; isn't that correct?

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800 A. Yes, sir; that is right.

Q. And to your knowledge that condition substantially prevails all over the country, does it not?

A. I think so.

Q. And do you recall how long the Order of Railway Conductors has represented conductors in negotiations with Southern Railway?

A. No, sir; I don't know that.

Q. It would be a great many years, would it not?

810 A. It would be over a long period of years I would think.

Q. So long as your recollection would go back?

A. For the twenty years I have been in transportation they have been doing it.

Q. Representing conductors in negotiations with the Southern Railway?

A. Yes, sir.

Q. And that would be generally true with the other organizations, would it not?

A. Yes, sir.

811 Q. When you discussed these claims with Mr. Utsey you were following the usual practice, were you not, with reference to a dispute arising under the contract as between the men and the company?

A. I don't recall just what was said between the two of us.

812 Q. I am not asking you to recall what was said, Mr. Birthright. I say, any discussions you may have had would have been in line with your usual practice on the Southern in discussing disputes arising between the conductors and the Southern Railway concerning an interpretation?

A. That is right; yes, sir.

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Q. And, as you say, there are a great many of those disputes arise over a period of years; isn't that right? 513

A. Not so many with one organization. If you would count them all collectively there would be quite a few.

Q. Can you give us an estimate for them all collectively over a period of a year?

A. I have no idea. I wouldn't make an attempt to guess.

Q. There would be so many you wouldn't know?

A. That is right. I couldn't for the life of me remember any one particular conference I have had.

Q. In other words, there is constantly disputes arising as between the men and the carrier as to whether the carrier has followed the collective contract in its operation; isn't that correct? 514

A. Yes, sir; that is correct.

Q. And the method by which the men use to raise that dispute for discussion is to file a time claim; isn't that correct usually?

A. That is the procedure.

Q. And then you, if you don't agree with that time claim, send the man a declination; isn't that correct? 515

A. That is right.

Q. Or if you do agree with it you pay him, do you not?

A. That is right.

Q. And if it is declined, then the usual procedure is for the man to turn it over to his local representative who represents his organization for further discussion with you; isn't that right?

A. If I decline the claim, then the general chairman usually handles it with the general manager and it progresses on up to the personnel officer if declined by the general manager. 516

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FRANK B. BIRTHRIGHT

Q. If it is not handled by you, then it is referred by Mr. Utsey—by the way, do you know who Mr. Utsey is or what position he occupies in his local division of the Order of Railway Conductors?

A. He is the local chairman for the local order here.

Q. And, generally, what is your knowledge as to his duties?

A. As local chairman?

Q. As local chairman.

A. He handles all matters and disputes between the management of the Southern Railway, which I represent.

Q. He doesn't talk to the general manager, does he, generally?

A. You didn't hear me finish.

Q. I beg your pardon.

A. He handles the disputes that might arise locally with me. I represent the management here in Charleston. That is what I meant to put over to you.

Q. I am sorry I interrupted you.

A. That is all right.

Q. And then if you decline his usual practice to your knowledge, is it not, is it to turn the dispute over to the general chairman of the Order of Railway Conductors?

A. Yes, sir.

Q. And then the usual practice is, is it not, for the general chairman to take the dispute up with some higher operating officer of the Southern Railway?

A. Yes, sir.

Q. And that is true, is it not, of all the train service brotherhoods to which you have referred?

A. That is the procedure.

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FRANK B. BIRTHRIGHT

Q. The practice has been followed, has it not, to your knowledge for a great many years on the Southern Railway Company?

A. Yes, sir.

Q. And that practice has resulted, has it not, in a great many settlements being reached as between the Southern Railway Company and these organizations on behalf of these men?

A. Now, let's get this straight. Settled where, for example?

Q. Either between yourselves or between some higher operating officer on the Southern and the organization representing the man or the man himself?

A. Well, I'll say in connection with that, that if I think the claim is a just one I'll pay it myself. If I turn it down, it may be that the general manager would overrule me and order me to pay it. Then if he should turn it down and the personnel officer feels that it is a just claim, he may instruct the general manager who will in turn instruct me to make the payment.

Q. And over the period of years all these many disputes that you have referred to, a number of them arrive at a settlement and determination by that process, are they not?

A. Well, I wouldn't say that; because a good many disputes were minor claims in which the men didn't submit time tickets.

Q. But some settlement was reached, was it not?

A. Yes, sir; that is correct.

Q. And many of them were eliminated by that, by settlement—either the men withdrew it or the Southern recognized it?

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A. Yes, sir. I very frequently pay claims myself, or the tickets have been withdrawn by the men when I convinced them that I was right.

Q. Your understanding is that that process is being followed out in accordance with the provisions of the Railway Labor Act?

A. I can't answer that.

Q. You don't know?

A. No, sir. I am not familiar with the act.

Mr. Willmarth: We withdraw it.

Q. How long has this Rule 5 (a) been in existence in schedules on the Southern Railway as between the conductors and the Southern, do you have any idea, Mr. Birthright?

A. Yes, sir. The date should be there. It said that those rights went into effect October 1, 1937.

Q. Perhaps I didn't make my question clear. I am referring to Rule 5(a) of the Schedule and I am asking you to make an estimate in years how long that rule has existed in that identical terminology as a pay rule governing the pay of conductors on the Southern Railway, irrespective of whether it was in this schedule or some former schedule.

A. I see what you are driving at. In other words, the principle of the rule?

Q. No. Just how long the exact rule has existed in the Schedule. I'll rephrase my question.

A. That rule, I know, has been in effect as long as I have been on the Southern Railway.

Q. Twenty years?

A. Yes, sir.

Q. And probably dates back much longer than that?

A. I would expect so, yes, sir.

Appeal from Charleston County

FRANK R. BIRTHRIGHT

Q. And to your knowledge is not that rule in effect on every Class 1 carrier of the country as between the brotherhoods and the railroad as a pay rule?

Mr. Barnwell: I object, your Honor. I don't see that that has any relevancy, cross examination as it is.

The Court: I think it is admissible under cross examination, Mr. Barnwell.

Mr. Barnwell: It seems to be covering a good deal of territory.

Mr. Willmarth: I am not going to dwell on it, your Honor.

The Court: Cross examination has a way of covering territory.

A. I'll answer that question, Mr. Willmarth, to the best of my knowledge. I am not familiar with what the rates of pay are in effect on other railroads.

Mr. Barnwell: We are going to put up a witness, Mr. Willmarth.

Mr. Willmarth: All right; we'll turn to something else.

Q. Mr. Birthright, what is the difference between an assigned man and an unassigned man?

A. An assigned man and an unassigned man? Well, my interpretation is that a man who is assigned is assigned to a regular job.

Q. A particular run, isn't that right?

A. On some particular run, yes, sir. And an unassigned man would be one on the extra board.

Q. Who was just called as needed?

A. That is my interpretation.

Q. This man on that regular job, do you agree with me as to at least the general principle that that man can't be run off that job or outside that assignment without becoming entitled to additional compensation?

FRANK B. BIRTHRIGHT

130 A. I don't quite get that question.

Q. Well, let's take this old run from Charleston to Columbia. That was an assigned run, wasn't it?

A. Yes, sir.

Q. That was that man's job?

A. Yes, sir.

Q. He got it by a bulletin?

A. That is right.

Q. The bulletin defined that run, did it not?

A. Yes, sir.

134 Q. And the job that was to be done?

A. It gave a description of what he was to do.

Q. Now, suppose you had ordered that man and his crew, after he had run from Charleston to Columbia and reached the end of his run, to take his train out on beyond Columbia ten miles, would you say he was still on his assignment?

A. No.

Q. He was off of his assignment, wasn't he?

A. That is right.

136 Q. And as a matter of fact, he'd make a claim for an extra day, would he not, for that additional run?

A. That is true.

Q. And hasn't the Southern settled many such claims for extra days for running outside assignments by paying an extra day to a man or a crew?

A. In some instances, yes.

Q. Over the years there has been a number of those payments, has there not?

A. That is right.

138 Q. Out of this negotiation that we spoke of, the Southern has recognized a number of times that a man has been run off his assignment and was entitled

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FRANK B. BIRTHRIGHT

to an extra day's pay for that part by which he was run off; isn't that right? 627

A. That is right.

Q. And that would be true, would it not, Mr. Birthright, even though he had completed his regular run, we'll say from Charleston to Columbia, in four hours?

A. That is right; yes.

Q. And he was run on beyond Columbia ten miles and back—we'll say it took him an extra hour to make that run—the Southern ordinarily would recognize a claim for an additional day's pay, would it not?

A. If he performed service that wasn't advertised in the bulletin, yes. 628

Q. They would recognize it?

A. That is right.

Q. And excluding some rule to cover it under the Schedule, they would recognize it as entitling that man to an additional day's pay, would they not?

A. That is right. He went beyond the advertisement of his run.

Q. And it wouldn't matter whether he had completed eight hours' time or not, would it? 629

A. Not a bit in the world.

Q. Not a bit?

A. No.

Q. If in completing his regular run he had accumulated overtime, it still wouldn't matter, would it?

A. No; he would still get that additional compensation.

Q. He would still get that additional day?

A. That is right.

Q. But you would probably deduct, if he had accumulated overtime from his regular run on that additional day, the overtime that he accumulated that 630

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was attributable to just this additional part on beyond his run, would you not, in paying him that additional day?

A. I don't think so.

Q. You'd pay him the whole day?

A. That is right.

Q. Without deducting any additional overtime which he accumulated in making that?

A. That is right. He has rightfully earned what he did make on his regular assigned run in accordance with the bulletin, and then this extra on some run perhaps that wasn't advertised in the bulletin.

Q. That would be true, would it not, Mr. Birthright, if on this run from Charleston to Branchville of 63 miles—that is an assigned run, is it not?

A. That is right.

Q. And the assignment defines the job, does it not?

A. That is right.

Q. For that man?

A. That is right.

Q. And that crew?

A. That is right.

Q. And if you run him off that assignment he would become entitled to an additional day's pay, would he not?

A. No; because it is impossible to run him off his—

Q. I mean, I am referring now to my illustration by running him on beyond Branchville.

A. Give me an example.

Q. All right. The man makes his run, Charleston to Branchville; 63 miles.

A. Yes, sir.

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FRANK B. BIRTHRIGHT

Q. And he completes it in less than eight hours—let's say seven hours—and then you decide to run him on beyond Branchville five miles.

A. Yes.

Q. That is off his assignment, is it not?

A. That is right. He would get an additional hundred miles for it.

Q. Whether he run five, ten or fifteen or three miles?

A. If he goes beyond the yard limit board; that is correct.

Q. If he just goes beyond the yard limit board and back and if it only takes him an additional fifteen minutes?

A. He could win out on that, yes.

Q. Because the principle being that the railroad has assigned him a job to do?

A. That is right.

Q. And when he is required to do anything beyond that job he is entitled under Rule 5(a) to an additional day?

A. That is correct.

Q. So when we get down to this question, isn't our dispute simply here whether or not this run from Preg-nall up to that plant is outside the assignment or within the assignment?

A. It is no dispute with me.

Q. But isn't that our dispute?

A. That is as I understand it.

Q. That is all that is really between us?

A. I understand it that way.

Q. We claim it is outside the assignment. If we are right we are entitled to that additional day, are we not, for that man?

A. I wouldn't say so.

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FRANK B. BIRTHRIGHT.

Q. I am just saying your own words, your testimony that if we are right and it is outside and off his job, then under the rules, as you have said, he is entitled to an additional day?

A. If that track had been constructed to be construed as a branch line, you are right.

Q. Mr. Birthright, are you answering my question or another question?

A. I am answering it to the best of my knowledge.

Q. Mr. Birthright, didn't Mr. Utsey come to you some time before these time claims ever started to be filed by the men and say to you "Mr. Birthright, you are adding a job on to these men by running them out there. We ought to have some negotiation as to a settlement"; isn't that right?

A. He may have.

Q. And didn't you say to him, "Well, I haven't got authority but I'll see if I can't get a settlement here for thirteen additional miles for these men over and above the hundred"?

A. No, sir. I never made any such statement as that.

Q. You never made any such statement?

A. No, sir.

Q. Didn't you also make that statement to the then acting local chairman for the Brotherhood of Railroad Trainmen?

A. I may have; I don't recall.

Q. As a matter of fact, didn't you to both of those local chairmen say that you thought they were entitled to something additional and that you would see, if agreeable to your superior officers, whether it couldn't be arranged for a settlement being made to pay them thirteen additional miles for that trip; isn't that correct?

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FRANK B. BIRTHRIGHT

A. It is possible that I made that statement.

Q. Don't you recall that discussion?

A. No, sir; I don't.

Q. You don't recall it either with Mr. Etsey?

A. No, sir.

Q. Nor do you recall it with the gentleman then acting as local chairman, Mr. Wiley?

A. I may have.

Q. Yes. You thought there ought to be some negotiation to give those men a little additional pay for that run, didn't you?

A. Not necessarily.

Q. You suggested that you would see whether you couldn't get that if agreed to?

A. I never took any action in the matter.

Q. You never took any action at all?

A. No, sir.

Q. You didn't submit that proposition to your superiors?

A. In no way whatsoever.

Q. To enter a contract to give them an arbitrary, in addition to their regular pay run they were making, thirteen miles additional for the run?

A. Never have with the management.

Q. Let's turn to something else, Mr. Birthright. I think this morning you discussed with Colonel Barnwell the instructions which these men are given as to making that run from Pregnall up to the plant; isn't that correct?

A. Yes, sir; that is right.

(Four documents were marked Defendant's Exhibits A-1, A-2, A-3, A-4 for identification.)

(Three documents were marked Defendant's Exhibits B-1, B-2, B-3 for identification.)

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FRANK B. BIRTHRIGHT

387 Q. Now, Mr. Birthright, I am handing you four documents identified by the reporter—

Mr. Barnwell: I'd like to see those if he is going to show them to the witness.

Mr. Willmarth: I haven't offered them yet.

Mr. Barnwell: It seems to me I have a right to see them.

The Court: I don't think so, Mr. Barnwell, on cross examination.

Mr. Willmarth: I haven't offered them yet, Mr. Barnwell.

388 Q. Are those typical of the work instructions given to these men by the train dispatcher for instructing them for the run into Pregnall up to the Ancor plant and the cement plant?

Mr. Barnwell: Are those papers that we are supposed to issue—is that what they are?

Mr. Willmarth: I am asking this gentleman.

A. That is right. These are instructions. This is similar to the instructions.

389 Q. Those are typical instructions issued by the dispatcher of the Southern Railway to the train crew or the conductor for making the run in from Pregnall to the plant?

A. That is true, but getting down—

Q. Just a moment. Answer my questions, please. Would that train crew make that run in from Pregnall to that plant without these instructions from the train dispatcher?

390 Mr. Barnwell: He is cross examining the witness on those documents. I think he has got to let us have them. He can show a document to a witness and ask him to identify it and see if that is such and such a thing, but once he starts cross examining him—

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Mr. Willmarth: I am not cross examining him on these documents. I am asking him whether they would go in under word instructions.

The Court: Is there any harm in letting Mr. Barnwell see those papers?

(Documents were shown Mr. Barnwell.)

Q. (By Mr. Willmarth) I am handing you three documents identified by the reporter as Defendant's Exhibits "B-1", "B-2", and "B-3". Are those typical of instructions as to making that trip in from Pregnall to Harleyville issued by the Southern Railway train dispatcher to the crew?

A. Not generally speaking, no.

Q. But somewhat similar instructions are issued to them, are they not?

A. That is right. But the dispatcher, he doesn't know what a branch line is even. When he says "Branch switch" here, all these tracks branch out.

Q. He sometimes calls it a branch line, does he not?

A. No, he didn't say that. He said "Branch switch" here. He doesn't say branch line.

Q. Leaving that word aside, are they typical?

Mr. Barnwell: I submit they should be in evidence.

Mr. Horlbeck: I don't think they are. When you get a witness to identify a thing, mark it for identification, and then we mark it as a part of our case.

Mr. Barnwell: That is correct. He can ask the witness to identify the paper and mark it for identification but the minute he starts cross examining that witness on that paper it has to go in evidence.

Q. (By Mr. Willmarth) I'll ask the witness if he can identify these.

A. These train orders? Yes, sir. These orders were likely put out.

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Q. From whom to whom and in what connection?

A. These train orders were put out by the dispatcher to Extra 817 West in one instance; 817 West in another instance; and 817 West in the third instance.

Q. Those are for orders to make a trip, are they not? Running rules for the trip from Pregnall to the plant?

A. No, sir. In no way whatsoever. These are just wait orders so as to advance a train on the main line from, say Dorchester up to Pregnall; No. 12 was running a little late and they issued this wait order and that enabled the dispatcher to advance a train.

Q. That is on these trains 60 and 61, are they not?

A. In this case, all of them were running—in all three instances all three trains were going west on the main line and No. 12 got a little late so the dispatcher put out a wait order.

Q. To whom?

A. Put out a wait order to Extra 817 West on three separate days so as to advance the local against the passenger train.

Q. Were those orders to the trains that we are referring to here and on this run, the crews on this run that we are referring to in the issue in this case?

A. Yes. Yes, that is right.

Mr. Barnwell: If he has given us notice to produce the original of certain documents, certainly he can't get copies in.

Mr. Willmarth: I haven't offered them yet.

Mr. Barnwell: He is putting them in evidence. He is getting the witness to testify as to the contents of them.

The Court: May I ask this question. Are you going to put them in?

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Mr. Willmarth: I may, your Honor. I don't know. I am doing this with the idea at this time of identifying them for later introduction.

The Court: Before this trial is over I am going to require them to be put in evidence and I want Mr. Barnwell to have the opportunity to see what they are. I mean, this is an equity court. I'm sitting here as a chancellor in equity and nothing can be concealed in this case from either side.

Mr. Willmarth: I just want the witness to make his own answers, your Honor.

The Court: I would make the same ruling with Mr. Barnwell as I am making with you. This is an equity court. This is one court in the world where you must not conceal any document.

(A document was marked Defendant's Exhibit "C" for identification.)

By Mr. Willmarth:

Q. I had you Defendant's Exhibit "C" and ask you if you can identify what it is.

A. Yes, I can identify it here. This is merely a form that the management asked us to have filled in, and what he wanted it for, I don't know. We just followed his instructions. I wasn't so inquisitive as to ask what it was.

Q. Asked who to have filled in?

A. Well, we sent these forms to conductors who actually operated the local between Charleston and Branchville, and whenever they went out to switch this industrial plant on this industrial track they were asked to fill in and give certain information there; and what it was for, I don't even know.

(A document was marked Defendant's Exhibit "D" for identification.)

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FRANK B. BIRTHRIGHT

Q. I am handing you a document marked by the reporter Defendant's Exhibit "D". I'll ask you whether or not you can identify it.

A. That has been the usual procedure in declining the tickets, yes, sir.

Q. Will you say for the record just what it is, Mr. Birthright, for formality purposes?

A. Sure. This is a letter signed by the superintendent and dated Charleston, September 26, 1945, file 37, and addressed to Mr. McConaughey, conductor, Mr. J. E. Price, flagman, and Mr. F. O. Bailey, brakeman. "Your time ticket No. 1(a), dated August 30, 1945, claiming side trip from Pregnall to Harleyville, is declined. We know of no rule under which such claim can be paid." It is signed "F. B. B."

Q. Your initials?

A. Yes, sir. They are my initials.

Mr. Willmarth: I think that is all.

Re-direct Examination

By Mr. Barnwell:

Q. Mr. Birthright, you were asked about a day's pay or a hundred miles run eliminating overtime. Do you know of any way you could eliminate overtime if it has been earned?

A. Yes, sir. By rearranging the runs.

Q. If overtime has been earned can you refuse to pay it? Is that a part of your expense?

A. If it is earned and properly so, it is paid.

Q. So if a run includes overtime you can't simply deduct the overtime and figure the expense of that run as so much a day, can you?

A. We live up to the contract in every way.

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FRANK B. BIRTHRIGHT

Q. You were asked some questions about disputes with your employees. Is it your policy to have conferences frequently with your employees over matters that come up where there may be some question as to their views and the company's view? 577

A. Hundreds of times.

Q. Are those always what you call disputes necessarily? 578

A. Might be little petty arguments that wouldn't amount to a hill of beans and we would settle it there in two minutes. If it is a reasonable request I usually grant it to keep down any agitation. 578

Q. But in those informal discussions—you say Mr. Utsey was mentioned here—did you all or not have informal discussions with Mr. Utsey concerning this Pregnall situation before they filed claims?

A. Yes, sir, I may have; yes, sir. I don't recall any particular one.

Q. But you don't deny it?

A. I don't deny it, no, sir; in no way whatsoever.

Q. As a matter of fact, no claims were actually filed until September 7, 1944? 579

A. That is right.

Q. The question has been asked you about these various documents, Pregnall to Harleyville; was that the general designation of this particular line, Pregnall to Harleyville?

A. No, sir.

Q. What was it? It is called in here "Pregnall to Harleyville", if you recall.

A. Well, it was put in the language of that because that is the way it was expressed by the claimants on their time tickets, the supplemental time tickets. 580

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FRANK B. BIRTHRIGHT

Q. On the claim he said he claimed side trip, Preg-nall to Harleyville.

A. That is right. And that general language was picked up by everybody here on the division, although it didn't mean that the plant was at Harleyville at all. It was at Ancor.

Q. But it was generally spoken of as Pregnall to Harleyville?

A. That is right. I don't expect half the men would know the name of that plant out there. It is an unusual name and Harleyville is a well known town.

Re-cross Examination

By Mr. Willmarth:

Q. I omitted one or two questions I wanted to ask, Mr. Birthright, as to the facts with reference to those various industrial tracks which you enumerated this morning about the switching done at plants along the line from Charleston to Columbia, or Charleston to Branchville. Have not those tracks been there a considerable number of years in each instance which you enumerated?

A. No, sir. Most of them have.

Q. Most of them have been there at least dating back prior to 1940, have they not?

A. No, sir.

Q. What ones have and what ones haven't?

A. Well, they all have except the track that serves the National Distillers at Lincolnville. That is a rather long track and that track has been installed and has been switched without complaint by train crews since the instigation of this suit in this court.

Q. When was that track—you say just recently?

A. Within the last year and a half.

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FRANK B. BIRTHRIGHT

Q. But with the exception of that track, all the other tracks were built and existing prior to 1940 for some years?

A. Oh, yes, sir. They have been here a long time.

Q. That one track which you mentioned—and I suppose you enumerated that among your tracks this morning?

A. Yes, sir. I enumerated that the first one.

Q. Where is that located?

A. That track is close to some small station, Lincolnville. It is about two miles this side of Summerville, which is twenty-one miles out of Charleston.

Q. How long did you say that track was?

A. If I remember correctly, it is over a thousand feet long.

Q. Generally speaking, taking this to represent a line of railroad, these tracks more or less fan out or cut off from the main line parallel to the line, do they not?

A. No, sir.

Q. They go straight out perpendicular to it?

A. No. You can't get an engine around that stiff a curve.

Q. But they curve out?

A. That is right. But I am glad you brought this up. This track that serves the National Distillers is very much similar to the industrial spur going to Ancor. Almost an angle of 90 degrees. In fact, it is after it gets so far out that you can put in the proper curvature.

Q. And it is a thousand feet long?

A. Approximately.

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FRANK B. BIRTHRIGHT

RALPH H. GRAHAM

Q. And you mentioned "more or less" I noticed this morning in depicting those feet, referring for instance to some figure such as 963 feet, "more or less." What you meant was in each instance that was approximately close to the length of the track?

A. Mr. Willmarth, I used that expression because very frequently I see attorneys draw up agreements and they say "more or less."

Q. I am not criticizing the expression. Don't misunderstand me. I wasn't criticizing the expression. I just wanted to be understood that it was somewhere nearly accurately reflected.

A. It would be within one or two feet, I would say. Mr. Willmarth: I think that is all.

(Witness excused.)

The Court: I think we had better take about five minutes out now.

(Five-minute recess.)

(After recess.)

RALPH H. GRAHAM, a witness for the plaintiff, after being sworn, testified as follows:

Direct Examination

By Mr. Barnwell:

Q. Your name is Ralph H. Graham, is that correct?

A. Yes, sir.

Q. And what is your occupation?

A. I am now trainmaster on the Danville Division.

Q. What was your position in Charleston in June, 1944?

A. Trainmaster.

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RALPH H. GRAHAM

Q. What service have you had with the railroad?

A. I entered service with the Southern Railway Company in September, 1915, as crew caller at Greenville, South Carolina. After filling this and various other clerical positions at Greensboro, Danville and Washington, in February, 1930, I was appointed chief clerk to the Superintendent of the Danville Division at Greensboro, North Carolina. On April 1, 1942, I was appointed assistant trainmaster of the Washington Division with headquarters at Strasburg, Virginia, having jurisdiction over the line between Manassas and Harrisonburg, Virginia. On September 1, 1943, I was appointed trainmaster on the Charleston Division with supervision over the entire division. On August 1, 1946, I was appointed trainmaster on the Danville Division with headquarters at Danville, Virginia.

Q. In those positions have you or not had to perform the duties of preparing and issuing bulletins as to runs, trains that were going to be run?

A. I have; yes, sir.

Q. Will you state briefly your duties in this position as to bulletins?

A. As chief clerk to the superintendent on the Danville Division, bulletins were prepared under my supervision, advertising trains and establishing new runs for conductors and trainmen. As assistant trainmaster on the Washington Division, bulletins were prepared for my territory by the trainmaster at Alexandria, Virginia, at my request and direction. As trainmaster on the Charleston Division, I personally issued bulletins and made assignments.

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RALPH H. GRAHAM

Q. Did you or not issue the bulletin TM-46, dated June 4, 1944, which is attached to the defendant's answer here?

A. I did.

Q. What type of service was inaugurated by that bulletin in connection with Branchville and Charleston?

A. Local freight service between Charleston and Branchville and Branchville and Charleston.

Q. Is Bulletin TM-46, that is the bulletin we are speaking about, the customary type of bulletin?

A. Yes, sir; it is.

Q. Its contents, is that in accordance with the custom and practice of railroads?

A. That is correct; yes, sir.

Q. And that states what?

A. The bulletin indicated the starting time of the local freight runs, initial and final terminals, and the number of days to perform the work.

Q. Has or not such a bulletin always been considered sufficient and satisfactory?

A. It has.

Q. In your experience with bulletins such as this have you ever seen one which specified that movements would be made on industrial tracks?

A. No, sir.

Q. This particular bulletin, is there any mention made on that of the switching on the Ancor industrial track at Pregnall?

A. None at all.

Q. Is any mention made of any industrial track between Charleston and Branchville?

A. No, sir.

Appeal from Charleston County

RALPH H. GRAHAM

Q. As far as you know, has any claim ever been filed for switching any of the industrial tracks on any point on the Charleston Division except this at the plant of the Ancor Corporation?

A. Not to my knowledge.

Q. As I understand, these bulletins call for bids by the various members of the train—posted information, is that correct?

A. That is correct; yes, sir.

Q. And as a result of the bidding were conductors assigned to these runs?

A. Yes, sir.

Q. What is the work contemplated when a local freight train is bulletined?

A. One crew is expected to perform work required of them between the terminals of the run, including setting out and picking up cars, loading and unloading merchandise, handling company material, switching and spotting cars on house tracks, team tracks, or industrial tracks.

Q. Since the issuing of this bulletin have the crews been switching the industrial tracks between Charleston and Branchville during the period you were here?

A. Yes, sir.

Q. To your knowledge have any claims been filed for extra pay for doing this switching on the industrial spurs?

A. None other than the claim filed for service on the switching the plant of the Ancor Corporation.

Q. You say switching the plant of the Ancor Corporation. I notice here some reference made to calling it the Harleyville branch switch, or the Pregnall-Harleyville run, or something of the sort; is that the

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same thing that you call switching the plant of the Ancor Corporation?

A. That is the same.

Q. Harleyville is merely the town through which this track to the Ancor plant passes?

A. It is beyond Harleyville.

Q. The Harleyville name is used in connection with it for that reason?

A. Generally speaking, yes, sir.

Mr. Willmarth: No cross examination, your Honor.
(Witness excused.)

LT. COL. DOUGLAS F. BUNCH, a witness for the plaintiff, after being sworn, testified as follows:

Q. Your name is Colonel Douglas Freeman Bunch?

A. Correct, sir.

Q. What is your present occupation, Colonel?

A. Lieutenant Colonel in the Army of the United States.

Q. What was your position at the time of these occurrences in June, 1944?

A. I was chief train dispatcher of the Charleston Division with headquarters at Charleston.

Q. What railroad experience have you had? What has been your railroading experience?

A. I have had more than thirty years experience in the operating department of various railroads, coming to the Southern Railway at Memphis from the Union Pacific at Salt Lake City in 1918. From Memphis I went to Knoxville and from Knoxville to the Appalachia Division at Big Stone Gap, Virginia. Then transferred as chief train dispatcher to the Columbia

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Division at Columbia, South Carolina. Later being transferred to Spartanburg as chief train dispatcher of the Spartanburg Division. Then back to Columbia, and in 1942 transferred, or appointed, chief train dispatcher at Charleston.

Q. And you continued to occupy that position until when?

A. Until I was ordered into the service of the Army in October, 1944.

Q. And in your service in the Army what type of work have you been doing?

A. I have been doing work on the various railroads in Europe and France, Belgium, Holland, and Germany, in the operating department with duties similar to a division superintendent of the American railroads.

Q. During the period you have been with the Southern Railway Company what are the various positions you have occupied?

A. Telegraph operator, train dispatcher, trainmaster, and chief train dispatcher.

Q. As chief train dispatcher of the Charleston Division, what are your duties, or were at that time?

A. My duties as chief train dispatcher consisted of jurisdiction over, of course, the dispatchers in my office and the clerical help, agents, telegraphers, on the line of road or on the division, directing the movement of trains, the makeup of freight and passenger trains as well as special trains, and various other duties, detail that would come under the operation of a division of a railroad.

Q. What are train sheets, Colonel Bunch?

A. Train sheets are the dispatcher's record of the movement of trains over a certain division. Each divi-

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603 sion has its own separate train sheets. It contains or shows various information. It shows each train operated over the division with the engine number, the name of the conductor and engineer, the time each report for duty, the time each are relieved from duty, the time the train passes each station where an operator is on duty. It carries the various delays to trains, weather conditions, and a memorandum of any extraordinary conditions that might arise in connection with the operation of a division of a railroad.

614 Q. Do your train sheets show the time that your conductors go on and off duty?

A. They do, sir.

Q. How is that obtained?

A. It is obtained by the time the train is called to leave its initial terminal. Frequently the conductor—in fact, in all cases—he shows on his memorandum the time he went on duty and at the end of the run he shows the time he went off duty.

625 Q. So that your record as to time served by a conductor is based practically universally on information furnished by the conductor himself?

A. Correct, sir.

Q. You have your train sheets here?

A. Yes, sir.

Q. Have you examined them with reference to the average time of duty each day for conductors on the local trains for the period involved here, that is, from September, 1944, to June, 1945?

A. Yes, sir.

636 Q. What do you find to have been the average time spent on the run? Have you got a memorandum that you made giving those times?

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A. I gave it to you, sir. I think that is it in your hand. 617

Q. You checked, yourself, the train sheets for the ten months?

A. Yes, sir.

Q. Refresh your memory from this paper—I understand you checked that yourself—what was the average time on duty each day for the conductors on the local trains for the ten months' period?

Mr. Willmarth: Objected to as immaterial, irrelevant, and in no manner binding on this defendant, and may it be understood that objection runs to all. 618

The Court: I'll have to overrule the objection.

Mr. Barnwell, that of course is the Branchville—Charleston run?

Mr. Barnwell: Yes, sir.

Q. Have you the train sheets showing operation of this local freight between Charleston and Branchville for that period?

A. Yes, sir.

Q. Have you checked those train sheets as to the time on duty of each day for the conductors on the local trains on that run? 619

A. Yes, sir.

Q. For the ten months' period involved—that is, from September, '44 to June, '45?

A. Yes, sir.

Q. And what is the average time?

A. Eight hours twenty-four minutes.

Q. And what was the average time spent on the run according to the train sheets? 620

A. Six hours twenty-three minutes.

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Q. Those train sheets show that these local trains do the local work at the various stations between Charleston and Branchville?

A. The sheets show the movement of the local trains and of course the local trains do the work.

Q. Those figures differ from the figures stated in the complaint. How do you account for that? Your figures are based on what?

A. On ten months.

Q. That is up to when?

A. Including from September through June.

Q. And these figures were based on what?

A. I understand eight months.

Q. Not including what months?

A. April and May.

Q. You have available since then the train sheets bringing it right up to the date of the bringing of the suit; is that right?

A. That is correct. Including April and May.

Mr. Willmarth: No cross examination.

(Witness excused.)

The Court: Mr. Barnwell, you didn't offer the train sheets in evidence and I suppose you don't mean to do that. Do you gentlemen want to look at them at all?

Mr. Horlbeck: We don't consider it particularly relevant, your Honor.

Mr. Barnwell: No, sir; we didn't offer them in evidence on purpose. I just wanted to show that he had made the calculations from the train sheets.

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JORDAN WILEY COX, a witness for the plaintiff, after being sworn, testified as follows:

Direct Examination

By Mr. Barnwell:

Q. What is your present position with the Southern Railway Company?

A. Assistant personnel officer.

Q. What has been your experience in railroading?

A. I entered the service of the Southern Railway Company in 1921 at Birmingham, Alabama, and held various clerical positions until 1924, at which time I was made transportation timekeeper. I was transportation timekeeper until 1928, when I was promoted to position of chief transportation timekeeper. From 1928 until 1939 I was chief transportation timekeeper, of course, and in 1939 I was made time inspector with headquarters in Washington, working out of the assistant vice-president's office. In 1940 I was promoted to position of chief time inspector in the Washington office of the assistant vice-president, which position I held until June 1, 1943, when I was made director of personnel of the Kentucky and Indiana Terminal Railroad Company at Louisville, Kentucky. I held that position until October 1, 1944, when I returned to the Southern as assistant personnel officer. Incidentally, during my time as director of personnel of the Kentucky and Indiana Terminal Railroad Company I was a member of the Fourth Division, National Railroad Adjustment Board, with headquarters in Chicago.

Q. In your position as assistant personnel officer, what duties do you perform?

A. From the time I took my present position, which was October 1, 1944, until August 15, 1946, I was one

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of the highest officers of the carrier designated to handle claims of conductors on appeal. Since August 15, 1946, I have been handling matters relating to the non-operating craft, such as clerical employees, shop-craft employees, maintenance way employees, and the like.

Q: In your work for the railroad, various positions you have held, have you become familiar with the various agreements covering the working conditions and operations?

A. Yes, I have. From the time I was made timekeeper it was my duty to, of course, review the time returns, or time tickets as we have been calling them, and determine whether or not the men should be properly paid. If I determined that the men were not entitled to the pay claimed on the time ticket it was my duty to decline the payment of the amount claimed and make the payment on the proper basis. As chief transportation timekeeper, I had supervision over other timekeepers and, of course, had occasion to interpret the agreement and supervise the work of the other timekeepers, and of course interpret the contract between the Southern Railway Company and the Order of Railway Conductors. As time inspector, I checked the time accounts all over the system, instructed the timekeepers in applying the various agreements, and performed related work. As chief time inspector, I supervised the work of other time inspectors, timekeepers, made rulings or compiled labor statistics and assisted in the negotiation of contracts with the various organizations and performed related work. And of course as director of personnel of the Kentucky and Indiana Terminal Railroad Company at

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Louisville, I had charge of all labor matters on the Terminal Company and negotiated contracts for the employees and interpreted the existing agreements.

Q. And that has been similar work on the Southern Railway?

A. Similar work on the Southern since I have been back here.

Q. As assistant personnel officer, what have been your duties with respect to the handling of the matters pertaining to conductors specifically?

A. Well, I handled matters relating to conductors until August 15, 1946—that is, from October 1, 1944, until August 15, 1946.

Q. And you, during that period, were the highest officer to whom appeals could be made?

A. I was one of them, yes.

Q. With whom did you deal with respect to conductors' matters?

A. The representative of the Order of Railway Conductors, who at that particular time was Mr. J. T. Lawrence.

Q. During that period did you have referred to you any claims of the conductors on the Charleston Division in connection with the industrial switching performed at Pregall?

A. Yes. They were referred to me.

Q. Refreshing your memory from Plaintiff's Exhibit 6, when was this matter first called to your attention and by whom?

A. It was first called to my attention in a letter dated October 10, 1944, addressed to Mr. R. P. Travis, Personnel Officer, Southern Railway System, Wash-

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ington, D. C., by Mr. J. T. Lawrence, who was then General Chairman, Order of Railway Conductors.

Q. Will you just read that letter?

A. The letter is dated Knoxville, Tennessee, October 10, 1944, addressed to Mr. R. P. Travis, Personnel Officer, Southern Railway System, Washington, D. C.

"Dear Sir:

"Please list the following claim of Conductor M. R. Lloyd, Charleston Division, for 100 miles at local freight rate in addition to his regular trip on train 60 and 61, on September 7th and 9th on local freight train between Charleston and Branchville, for being required to make lap back trip from Pregnall to Harleyville, South Carolina, for the purpose of switching the aluminum plant 6.3 miles from the main line at Pregnall to the plant which is government track from the Southern Railway main line at Pregnall.

"Filing of claim was held up as Superintendent Birthright had advised Local Chairman Utsey he was trying to get ruling, but never advised him, hence the above claims were filed and declined by the Superintendent on September 25th.

"You may hold these claims for disposition as previously referred to, together with other lap back claims. But as I understand it, this lap back trip is required daily.

Yours truly,

(Signed) J. T. LAWRENCE, *General Chairman, Order of Railway Conductors, Southern Railway System.*"

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Q. Will you look at these two papers which I hand you? They are Plaintiff's Exhibits No. 1 and No. 4. Are those the time tickets referred to in Mr. Lawrence's letter?

641

A. Yes; they are.

Q. What are the claims as made by the time tickets and what are the claims as made by Mr. Lawrence's letter?

A. On the time ticket dated September 7, 1944, the following notation appears under "Remarks," and I quote: "Side trip Pregnall to Harleyville alumina plant and return to Pregnall. Continued on trip to Branchville."

642

Q. Read the next one.

A. On the time ticket dated September 9, 1944, the following appears under "Remarks," and I quote: "Side trip Pregnall to Harleyville alumina plant and return. Continued on local to Branchville."

Q. Will you refer to Mr. Lawrence's letter. What does he make a claim for there?

A. He contends it was a lap-back trip.

643

Q. He said a lap-back trip from Pregnall to Harleyville?

A. Yes. He said, I quote: "for being required to make lapback trip from Pregnall to Harleyville, South Carolina, for the purpose of switching the aluminum plant 6.3 miles from the main line at Pregnall to the plant which is government track from the Southern Railway main line at Pregnall."

Q. After you received Mr. Lawrence's letter, what took place?

644

A. I had a conference with Mr. Lawrence.

Q. And when was that? Approximately when?

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645 A. I believe it was several weeks later. I don't remember the exact date but I wrote him following that conference and confirmed the handling given it.

Q. At that conference what took place with reference to your action toward the claim?

A. We discussed the claims and I declined payment and I later confirmed the declination in a letter.

Q. Is that the letter confirming the declination? What is the date of that letter?

646 A. Yes. This is the letter. It is dated at Washington, D. C., December 19, 1944.

Q. That is marked Exhibit 7, is it?

A. Yes, sir.

Q. Just read it.

A. "Washington, D. C., December 19, 1944.

"Mr. J. T. Lawrence, General Chairman,
Order of Railway Conductors,
508 Martin Mill Pike,
Knoxville, Tennessee.

647 "Dear Sir:

"I refer to your letter of October 10, 1944, to Mr. Travis, appealing to him the claim of Conductor M. K. Lloyd, Charleston Division, for pay for 100 miles at local freight rate in addition to pay for his regular trip on trains 60 and 61, September 7 and 9, 1944, account being required to make a movement from Pregnall to Harleyville, S. C., for the purpose of performing switching in the aluminum plant.

648 "We discussed this claim in conference in my office December 13, and I declined payment. This

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will confirm that declination. I cannot subscribe to the theory that claimant made a so-called lap back trip which is the basis on which you are handling the claim.

“Very truly yours,

(Signed) J. W. Cox,

*Assistant Personnel
Officer.”*

Q. I now hand you Plaintiff's Exhibit No. 8 and ask you, is that the reply that you got to that letter?

A. Yes. This is the reply.

Q. Will you read that?

A. “Knoxville, Tennessee, December 26, 1944.

“Mr. J. W. Cox, Assistant Personnel Officer
Southern Railway System,
Washington, D. C.

“Dear Sir:

“This refers to your letter of December 19th, your file LF-9-L-44, further declining the claim of Conductor M. K. Lloyd, Charleston Division, for 100 miles at local freight rate in addition to pay for his regular trip on trains 60 and 61, September 7th and 9th, 1944, for being required to make a turnaround movement from Pregnall to Harleyville. Which movement was in violation of Article 5-(a).

“As you claim this is not a lap back movement under your definition of a lap back movement, and as the case has been discussed as required by the

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Railway Labor Act. The claim will be progressed in due time.

"Yours truly,

(Signed) J. T. LAWRENCE,

*General Chairman, Order
of Railway Conductors,
Southern Railway Sys-
tem."*

Q. What is it called there?

A. A lap-back movement.

Q. He calls it what else—turnaround?

A. Yes. He says, and I quote: "For being required to make a turnaround movement from Pregnall to Harleyville."

Q. I hand you Plaintiff's Exhibit 9 and I ask you if that is the letter you wrote Mr. Lawrence in reply to his letter?

A. Yes. This is it.

Q. Read that.

A. "Washington, D. C., March 23, 1945.

"Mr. J. T. Lawrence, General Chairman,
Order of Railway Conductors,
508 Martin Mill Pike,
Knoxville, Tennessee.

"Dear Sir:

"I refer to your letter of December 26, 1944, and previous correspondence concerning the claim of Conductor M. K. Lloyd, Charleston Division, for pay for 100 miles at local freight rate in addition to pay for his regular trip on local freight trains 60 and 61, September 7 and 9, 1944, account being required to make a movement from Pregnall to

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— Harleyville, S. C., for the purpose of serving the aluminum plant of the Defense Plant Corporation at Harleyville.

“As I understand your letter of October 10, 1944, to Mr. Travis and your letter of December 26, 1944, to me, you base the claims on Article 5-(a) of the Conductors' Schedule and contend that the conductor made a so-called lap back movement when switching the aluminum plant. It seems to me that the situation at Pregnall is identical to the situation at many other industries; that is, the industry owns the track either from the clearance point or the right of way line into the plant and owns all of the plant tracks. Road crews cut off from their train and take cars into industries and place them on tracks belonging to the industries and pick up cars from such tracks. In some instances, industries have their own switch engines and perform all intra-plant switching. Nevertheless, road crews have always been required to go over the tracks belonging to the industries into the plant and deliver and pick up cars. This is normal railroad operation. The railroads could not serve industries if such moves were not made. Never in the history of this railroad has a crew filed claim alleging Article 5-(a) was violated or that they were required to make a so-called lap back movement in serving the industries in this manner. The movement involved in serving the aluminum plant of the Defense Plant Corporation is identical to movements made every day by road crews in serving other industries at other points. This being true, will you please be kind enough to

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advise me how you differentiate between the operation involved in serving the aluminum plant of the Defense Plant Corporation and in serving other industries? Why do you contend Article 5-(a) is being violated in serving this plant when no such contention has ever been made with respect to similar service afforded other industries throughout the years on this railroad?

"Very truly yours,

(Signed) J. W. Cox,

*Assistant Personnel
Officer."*

Q. Did you or not get any answer to that letter?

A. No. I received no answer.

Q. What is the next thing that happened?

A. I believe some more claims were listed, Colonel.

Q. Did you have any further conference in March—
March 28, '45?

A. Yes. We had other conferences.

Q. And what was the result of those?

A. The discussions were about the same and I declined payment of the other claims.

Q. I hand you Plaintiff's Exhibit 10 and ask you if that is the final letter written in the matter?

A. I can't say, Colonel, it was the final letter written in connection with this matter; because some more claims were appealed, as I recall it, and subsequent conferences were held.

Q. What is that? That is the letter written confirming the conference?

A. This is a letter written following our conference on March 28, 1945.

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Q. Just read it.

A. "Washington, D. C., March 30, 1945.

"Mr. J. T. Lawrence, General Chairman,
Order of Railway Conductors,
508 Martin Mill Pike,
Knoxville, Tennessee.

"Dear Sir:

"In our conference of March 28, 1945, we discussed the claim of Conductor M. K. Lloyd, Charleston Division, for pay for 100 miles at local freight rate in addition to pay for his regular trip on local freight trains 60 and 61, September 7 and 9, 1944, account being required to make a movement from Pregnall to Harleyville, S. C., for the purpose of serving the aluminum plant of the Defense Plant Corporation at Harleyville.

"You stated at the beginning of the discussion that you had appealed certain other similar claims to General Manager Adams and that he had not, up to the present time, replied to your letter. Under these circumstances, as these claims were not then before me, we did not discuss them in detail. We did, however, discuss the matter in a general way and agreed to look into the matter further with the view of seeing whether or not a settlement can be reached. In our discussion, I drew your attention to my letter to you of March 23, 1945, in connection with this particular matter and requested that you reply to the letter. This you said you would do. I realized at the time that you had not had an opportunity to do so when we discussed the claims.

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"In our discussion, you indicated that you had been informed the locals were operated under train orders as extras between Pregnall and Harleyville, and I told you that was not my understanding, but I would look into this particular matter and advise you. The question was also raised as to whether or not trains of other carriers use the track between Pregnall and Harleyville. I will also look into that matter and advise you. Meanwhile, I should like to have a reply to my letter of March 23. I should also like for you to state the rules in the schedule on which you rely in support of your position.

"Very truly yours,

(Signed) J. W. Cox,

*Assistant Personnel
Officer."*

Mr. Barnwell: Your Honor, it is about six o'clock and I think that would be a mighty good time to interrupt this witness.

The Court: He'll have more testimony!

Mr. Barnwell: Yes.

The Court: All right. We meet at ten o'clock in the morning and he is on the stand.

Mr. Horlbeck: Your Honor, I would like very much to have that form of order which we submitted the first thing this morning attached to the notice and filed. You see, the notice describes it only by reference to the order.

The Court: That is all right.

(Whereupon, at 6:00 p. m., a recess was taken until 10:00 a. m., June 24, 1948.)

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Charleston, S. C., June 24, 1947. 673

JORDAN WILEY COX resumed the stand and testified further as follows:

Direct Examination (continued)

By Mr. Barnwell:

Q. After the filing of those two claims of September 7 and September 9, 1944, were any other claims filed by conductors on this local freight train known as No. 60 and 61, operating between Charleston and Branchville, on account of being required to perform industrial switching on the track of the Aneur Corporation? 674

A. Yes. A good many claims were filed.

Q. What action has been taken on those claims?

A. Payment of the claims has been declined.

Q. Have any of them been paid?

A. No, sir. None of them have been paid.

Q. Is that still a pending controversy as to the question of the payment of those claims?

A. Yes; that controversy is still pending. 675

Q. The railway conductors refuse to accept your refusal?

A. That is correct.

Q. Just what is that controversy, in your own words?

A. Briefly, it is this—

Mr. Willmarth: That is objected to as invading the province of the court, calling for an opinion and conclusion of the witness, and may my objection stand to every similar question. 676

The Court: Mr. Barnwell, the controversy is what we are trying to settle here now, isn't it?

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Mr. Barnwell: I want him to state the nature of the controversy. I think that he could state what the issue is.

The Court: Doesn't the complaint and the answer state the issue?

Mr. Barnwell: Yes, sir. I don't know that it is necessary.

The Court: I don't think so.

By Mr. Barnwell:

Q. In a few words, the controversy is the question as to the construction of this contract, is that it?

A. That is correct, sir.

Q. I hand you Exhibit 12, which is the contract. Where do the provisions concerning freight service first appear in that agreement?

Q. Rules relating to freight service first begin on page 6 of the printed booklet as Article 4; Article 4 being preceded by the caption "Freight Service."

Q. Is that the article that deals with rates of pay?

A. Yes, sir. Article 4 might be said to be the pay article, as it deals with the rates of pay.

Q. I think it has been previously testified that the articles involved particularly here are Article 5, 6, and 7, is that correct?

A. Yes, sir. Those are the principal articles involved.

Q. Refer to Article 5-(a). That has reference to what?

A. It is captioned "Basic Day," and describes the measure of a day's work.

Q. And a day's work under that consists of what?

Mr. Willmarth: Objected to.

Mr. Barnwell: He has got the rule in front of him.

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Mr. Willmarth: It is calling for conclusion and opinion of the witness.

The Court: You are just—

Mr. Barnwell: Referring to the rule and declaring it, your Honor.

The Court: That is correct.

Mr. Willmarth: The contract itself being the best evidence. May my objection stand to all similar testimony.

A. Article 5-(a) captioned "Basic Day" reads: "In all road service, except passenger, 100 miles or less, 8 hours or less (straightaway or turn-around), shall constitute a day's work; miles in excess of 100 will be paid for at the mileage rates provided, except as provided, for in Article 28." The rule merely defines the minimum measure of a day's work. It further provides that 100 miles is the equivalent of eight hours and the eight hours is the equivalent of 100 miles.

Mr. Horibeck: Can he construe the contract? Isn't that the function of the Court, your Honor? But for him to read the rule and then construe it—it seems to me that is for the Court.

The Court: I don't think he is construing it. I understand he is reading it.

Mr. Horibeck: He has finished reading it.

The Court: No; you stopped him in the middle of it. Were you through?

The Witness: No; I wasn't through, your Honor.

The Court: Of course, the contract speaks for itself; it is in evidence and, of course, those words are in it. It has already been read into the record once by one of the other witnesses and it is in here. It can't be

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changed. Mr. Barnwell asked him to read it, and I suppose there is no harm.

Mr. Horlbeck: Maybe I didn't hear correctly. I understood him to start to say what it meant.

Mr. Barnwell: I think he has a right to explain the meaning of certain words in there. For instance, "straightaway," "turn-around," "terminal."

The Court: You see where all of us are wasting time. All he is asked to do is to read it. Go on and finish it.

By Mr. Barnwell:

Q. Will you finish reading it?

A. I finished reading it.

Q. You read (b), also?

A. I didn't read (b), also.

Q. Go ahead and read (b).

A. "In through freight or mixed train service, a straightaway run is a run from one terminal to another terminal; and not less than one hundred miles will be allowed for each such run, except as provided for in Article 28."

Q. Now, what effect has Article 28 on that? What is Article 28?

A. Article 28 has to do with so-called excepted runs and isn't involved in this controversy; a run such as circus trains and runs of that character.

Q. How long has Article 5-(a) been in the contracts with the conductors?

A. It came into being in 1919 under federal control. And was first incorporated in the agreement with conductors effective as of December 1, 1919, in the agreement signed with the conductors dated February 28, 1920.

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Mr. Barnwell: Instead of offering this in evidence, with the approval of the other side we'll submit it—if we offer it in evidence it has to be printed in the record and I don't think we need all of it; you're familiar with it; Supplement 25, General Order No. 27—I'll submit it to him with their consent and get him to describe such portions of it as are pertinent, without necessarily putting it in the record. Either side can use such portions as they see fit. I just suggest that as a procedure to avoid publishing pamphlet.

Mr. Horlbeck: That is all right.

By Mr. Barnwell:

Q. I hand you this printed pamphlet entitled "Supplement No. 25 to General Orders No. 27." Is that the agreement you referred to as having been issued by the Railroad Administration December 15, 1919, and effective December 1, 1919?

A. Yes, sir.

Q. Will you refer to Article 6? What portion of it is the origin of this 5-(a)?

A. Rule 5-(a) or Article 5-(a) of the current conductors' agreement of May 16, 1940, was copied from Article 6 of Supplement No. 25 to General Order No. 27.

Q. Read that, please.

A. "Article 6. Basic Day and Overtime. (a) In all road service, except passenger, 100 miles or less, 8 hours or less (straightaway or turn-around), shall constitute a day's work; miles in excess of 100 will be paid for at the mileage rates provided.

"(b) On runs of 100 miles or less, overtime will begin at the expiration of 8 hours. On runs of over 100 miles, overtime will begin when the time on duty

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exceeds the miles run divided by $12\frac{1}{2}$. Overtime shall be paid for on the minute basis at a rate per hour of three-sixteenths of the daily rate.

"(c) Road conductors and trainmen performing more than one class of road service in a day or trip will be paid for the entire service at the highest rate applicable to any class of service performed. The overtime basis for the rate paid will apply for the entire trip."

Q. I don't think that last part has any reference her. That is Article 6. The first portion is what you said was competent to the railroad agreements?

A. Yes, sir. Paragraph after this article.

Q. Prior to the action of the Director General, which you have just read, did the Southern have an agreement with the conductors defining a day's work in freight service?

A. Yes, sir; it did. That agreement was dated January 1, 1917.

Q. Is this a contract of schedule and wages and rules and regulations for conductors, trainmen and yardmen, effective January 1, 1917, that you just referred to?

A. Yes, sir, that is it.

Q. Will you refer to page 5 and page 6 and tell me what was the agreement at that time with reference to this particular matter?

A. Beginning on page 5 of this contract under the caption "Through Freight and Mixed Service," the rates of pay for conductors and other members of the crew are shown. Following that is this, and I quote: "Runs of 100 miles or less, either straightaway or turn-around, to be paid for as 100 miles." On page 7

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under the caption "Local Freight Service," following the rates of pay is shown the following, and I quote: "100 miles or less to be paid for as 100 miles." Under the caption "Work, Construction or Wrecking Service," and following the rates of pay for that service, the following rule appears and I quote: "100 miles or less, eight hours or less, to constitute a day's work. Excess mileage over 100 miles to be paid at mileage rates; overtime after 12½ miles per hour." Under the caption "Mine Run Service" on page 8, after the rates of pay are shown is the following rule, and I quote: "100 miles or less, 8 hours or less, to constitute a day's work." Under the caption "Helper Service and Helper Switching Service" are shown the rates of pay and following that is this rule, and I quote: "Excess mileage over 100 miles in helper service to be paid miles or hours, whichever is the greater."

Q. You said that the present rule was copied from the Supplement 25 to General Orders 27. When did that first appear in the contracts between conductors and the railroad?

A. The first appeared in the agreement which became effective as of December 1, 1919, and which was signed on February 28, 1920. It appeared in that contract as Article 5-(a).

Q. That is when it was first copied from the Director General's order?

A. Yes. From Article 6-(a) of Supplement 25 to General Order No. 27.

Q. What is in effect the practical difference between 1917, which is the one you have just read before that, and 1919?

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701 A. The net effect was to consolidate the various definitions for the several classes of freight service into one definition showing the measure of a day's work. And that applies to freight service.

Q. Was that Supplement No. 16 of the Director General superseded by the Supplement 25?

A. Yes, sir. Supplement No. 25 to General Order No. 27 superseded Supplement No. 16 to General Order No. 27.

702 Q. Will you refer to that—is that the supplement you testified to?

A. Yes. This is Supplement No. 16 to General Order No. 27 and—

Q. That is supplement to No. 16, isn't it?

A. This is Supplement No. 16 to General Order No. 27 and became effective January 1, 1919.

Q. That is the supplement which was superseded by the supplement which you just read—you read I think from Supplement 25, didn't you, while ago?

703 A. Supplement No. 25 superseded Supplement No. 16 to General Order No. 27.

Q. What was the provision of Supplement No. 16, Article 6, and how is that modified by Supplement 25?

A. Article 6, captioned "Basic Day and Overtime," of Supplement No. 16 to General Order No. 27 reads: "(a) In all road service, except passenger service and where under mileage schedules a more favorable condition exists, 100 miles or less, 8 hours or less (straightaway or turn-around), shall constitute a day's work; miles in excess of miles required for a minimum day will be paid for at the mileage rates provided.

704 "(b) Where there is no existing agreement regarding overtime provisions more favorable to the employ-

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ees on runs of 100 miles or less, overtime will begin at the expiration of 8 hours. On runs of over 100 miles overtime will begin when the time on duty exceeds the miles run divided by 12 1/2. Overtime shall be paid for on the minute basis, at not less per hour than one-eighth of the daily rate."

Q. As I understand, that which you have just read was then modified by Supplement 25 which you have already read?

A. Yes, sir, that is correct.

Q. And it was the language of Supplement 25 which was incorporated in the contract of December, 1919, which you just read?

A. Yes, sir; that is correct, sir.

Q. Then that language was carried into the present contract, is that right?

A. Yes, sir. The rule has been brought forward up to the present time unchanged.

Q. Did I understand you under the contract prior to government control—that is, you have given the contract of 1917—the only practical difference is that it was a consolidation in briefer language?

A. That is correct, sir.

Q. Referring to the contract effective December 1, 1919, will you please read from page 37 the second paragraph, under caption "Terms and Agreement."

A. "This schedule is made effective as of December 1, 1919, but was executed February 28, 1920, in conformity with the terms of the settlement award of the committee of the Council of National Defense made in New York under date of March 19, 1917, and decisions handed down by the commission of eight subsequent to the latter date. It is also understood and

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799 agreed that the provisions, awards and principles embodied in General Order No. 27 and Supplements No. 16 and No. 25 thereto, including interpretations thereon, not otherwise specifically mentioned in this agreement shall be recognized as a binding part of this agreement."

Q. You have the present contract. You have been discussing Article 5 (a), or 5. Will you now take up Article 6, when and where did that rule come from?

710 A. Article 6 was copied from Article 11(a) of Supplement No. 25 to General Order No. 27.

Q. And had that appeared previously in Supplement 16?

A. Yes. It did previously appear in Supplement No. 16.

Q. And that was copied into the contract of December 1, 1919?

A. Yes, sir.

Q. Read the provisions of the contract of December 1, 1919. Article 6.

711 A. Article 6 of the contract which became effective December 1, 1919, under the caption "Beginning and Ending of Day." "In all classes of service, other than passenger, trainmen's time will commence at the time they are required to report for duty and shall continue until the time they are relieved from duty at end of run. All advance call time rules are superseded and the management may designate the time for reporting for duty."

Q. Referring to the present contract in connection with that—explain that.

712 A. The words "trainmen" have been changed to "conductors" because when the contract was negoti-

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ated in 1919 it was joint with conductors, trainmen, yardmen, and switch tenders. The contracts were separated effective May 16, 1940, and it naturally became necessary to change the word to "conductor" rather than "trainmen." However, throughout the years it was generally understood that trainmen included conductors. The last sentence was, of course, eliminated because there was no longer any necessity for that provision.

Q. Refer to Article 7 of the current contract entitled "Overtime." What is the origin of that? I think you have already read that in connection with Supplement 25?

A. Yes. I read it, Colonel. It was taken from Article 6 of Supplements No. 16 and 25 to General Order No. 27.

Q. It was taken from Article 6(b)?

A. Yes, sir.

Q. Of Supplement 25 to General Order No. 27 which you have already read?

A. Yes, sir, that is correct.

Q. And that was first incorporated in the contract of December 19, 1919?

A. Yes, sir, that is correct.

Q. What is the practical operation of that article with reference to overtime?

A. It means that overtime is paid after the expiration of eight hours or when the time on duty exceeds the miles run divided by 12½. For example, if we have a straightaway run from Point A to Point B and the distance between the two terminals is, say, 75 miles, and the conductor makes such a run in local freight service and is on duty, say, ten hours, he would re-

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717 receive pay for 100 miles even though the distance is only 75, and in addition he would receive pay for two hours at the rate of time and one-half. In a case where the run is over 100 miles, say 125 miles for example, a conductor making such a run on a straightaway basis from terminal to terminal would receive pay for 125 miles even if on duty four, five, or six hours. If he were on duty, say, eleven hours, his overtime would accrue at the expiration of ten hours. Therefore he would receive pay, if on duty eleven hours, for 125 miles plus one hour at the rate of time and one-half.

718 Q. How do you arrive at the ten hours on the 125 miles?

A. Divide 125 by 12½.

Q. Twelve and a half miles per hour?

A. That is the basis.

Q. Do both Articles 6 and 7 apply to all classes of road service?

719 A. They apply to all classes of service except passenger, Colonel, specific provision being made to the effect that they are not applicable to passenger service.

Q. Under Article 6 and 7 how is the time computed?

720 A. Time is computed on a continuous time basis from the time the conductor goes on duty at his initial terminal until he is relieved from duty at the end of his run. I might say in that connection that the agreement contemplates that a trip begin and end at a terminal. If on a straightaway basis it begins at your initial terminal and ends at your final terminal. On a turn-around basis it begins at the initial terminal and continues until he arrives back at the initial terminal.

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Q. Do those articles contemplate the time may be interrupted at some intermediate point between the terminals while another day's work is performed at such point?

A. No, sir, they do not. They contemplate the time be paid on a continuous time basis from the time of going on duty until relieved from duty. In fact, the agreement doesn't contemplate being relieved while on the road except in compliance with hours of service laws.

Q. Since Articles 5-(a), 6 and 7 were first incorporated in the agreement, has the Order of Railway Conductors itself gone on record that they are not entitled to an additional day's pay when the conductor is required to double the road to help trains up a hill?

A. Yes, sir, they have. A memorandum was issued by the presidents of the four train service organizations, I believe is effective December 15, 1920.

Q. Refreshing your memory from this pamphlet gotten out by the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen, Order of Railroad Conductors, Brotherhood of Railroad Trainmen, dated June 15, 1920, distributing memoranda, or decisions issued by the Director General as a result of conferences between representatives of "our organizations and of the Director General upon questions arising under Supplements No. 15 and 16 to General Order No. 27," and referring to memorandum No. 15-89 at the bottom of page 20. Will you state what was the position taken by the Order of Railroad Conductors in this matter that you just testified to?

A. They agreed to the following, and I quote the decision—

Q. What has that got reference to?

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725 A. This relates to the rule which is now Article 5-(a) of the current agreement. The decision reads as follows: "Submission shows that Bradford is engine terminal, at which point the Binghamton pusher crew also reside. Article 4-(a) of Supplement No. 15 provides road freight rates for pusher and helper service and Article 7 places all service covered by Article 4 on basis of day of 100 miles or less, eight hours or less. Under question 51(e) of Interpretation 1 to Supplement 15, trip rates representing fractional parts of
726 a day are superseded by Article 4 and 7. Crews used in pusher or helper service take the conditions of such service in which service crews are to be operated and paid on the basis of 100 miles or less, 8 hours or less, to constitute a day; and crews may be held in continuous service for a succession of trips to produce, so far as the service will permit, the miles or hours constituting a day. In this case crew would not be entitled to second or additional day unless starting trip out of Bradford, their terminal, after 8 hours from time first
727 trip was begun out of same point."

Q. As I understand, those were decisions circularized as a result of conferences between the railroad labor organizations and the Director General of Railroads?

A. Yes; that is correct. And I might add at this point that Supplement No. 15 to General Order 27, as well as Supplement No. 24 to General Order No. 27, related to engineers and firemen. In other words, Supplements 15 and 24 to General Order No. 27 were comparable to Supplements 16 and 25 to General Order
728 No. 27.

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Q. With reference to the duties of a conductor in local freight service, where are his duties stated and what articles of the contract are applicable in calculating their rate of pay? 731

A. Articles 4, 5, 6, and 7 are applicable; Article 4 being the pay article, Article 5 defining the measure of a day's work, Article 6 indicating when his time begins and ends, and Article 7 indicating the basis of overtime. The conductor, of course, is in charge of the train and when he leaves the terminal he is expected to perform all of the necessary local freight service on the run. He receives— 732

Q. As I understand—Go ahead.

A. Of course, he receives instructions from the trainmaster, chief dispatcher, and from the agents at the stations where the train stops. If cars are to be picked up or placed for loading or unloading, the chief dispatcher may give the instructions or the agent may do so.

Q. It has been testified that the rates as stated in this book here are not rates in effect at the time this suit was brought. Those rates at that time were what? 733

A. When this contract was printed, Colonel, the rates of pay for local freight conductors were \$7.62 a day. At the time of the filing of these claims the rate had been increased to \$9.10 a day. At the present time the rate is \$10.58 a day. The time and one-half rate being 198½ cents an hour.

Q. That is the present overtime rate, whereas at the time the suit was brought the overtime rate, as I understood from Mr. Birthright, was \$1.71? 734

A. Yes, sir, that is correct.

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790 Q. Do the local freight conductors get more or less than the through rate conductors?

A. The rate of pay for local freight conductors is higher than the rate for through freight conductors. They are in a slower class of service.

Q. Where the crew works less than the calendar working days, what about his pay?

794 A. There is a rule in the agreement under Article 4 that has the effect of guaranteeing conductors in assigned local freight service pay for at least 100 miles for each day assigned to that service. For example, if we have a crew assigned to the local train operating between Charleston and Branchville and there is a serious derailment or storm of some kind and we do not operate the train, then we are required to pay the conductor for a day.

Q. And that is under what?

A. That is under—

Q. Read that at the bottom of page 6.

796 A. It comes under Article 4-(b) under the caption "Guarantees, Local Freight Service." "Regularly assigned local crews working less than the calendar working days of the month will be guaranteed not less than 100 miles per day for each calendar working day—excepting for days where the line is broken through the act of Providence.

"Calendar working days shall be construed to include Legal Holidays."

798 Q. So, in other words, if for any reason except Providential, if the freight train doesn't run on the Fourth of July or Thanksgiving Day, they are paid just as though it had run?

A. Yes, sir, they are paid.

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Q. That applies, I understand, only to this service that is in dispute here, the local? 787

A. Only the local freight service and applies to men assigned to that service.

Q. Suppose under that rule if you computed the pay in miles it would be less than if you computed it in hours, or if you computed it in hours it would be less than if you computed it in miles. What would be the rate of pay?

A. I don't exactly understand your question, Colonel. 788

Q. Would the man get the greater award or lesser award?

A. He would get the greater award.

Q. In other words, if you calculated on the 8-hour basis and it didn't amount to as much as if you calculated it on the 100-mile basis, he would have to be paid on the 100-mile basis, is that right?

A. Under the contract, Colonel, eight hours is the equivalent of 100 miles and 100 miles is the equivalent of eight hours. If he made a trip we couldn't pay him less than eight hours or at 100 miles. 789

Q. Referring to Article 7 of our present contract, which I understood you to say was copied from Article 6-(b) of Supplement 25, providing for the establishment of a method of time payment compensation upon which time and a half is allowed for time on duty in excess of eight hours or on a run of over 100 miles. In other words, that has reference to overtime, as I understand it. Do you know the conditions under which the Director General agreed to this extra pay for overtime? 790

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741 A. Yes, sir. There is an official record of that. It was made about 1919.

Q. I hand you a printed pamphlet entitled "United States Railroad Administration, Director General of Railroads, Washington, December 17, 1919, Memorandum of Understanding." Calling your attention to the top of page 2, will you read that, please.

742 A. (Reading.) "It seems to me that the best way to accomplish the giving of reasonable additional compensation to the employees in this slower freight service so as to remove the unjust discrimination which in a broad and general way it seems to me exists between them and the employees in this faster freight service is on the one hand to allow time and one-half for overtime, and on the other hand to cut out in all freight service all special arbitraries and allowances of every character, including initial terminal delays and final terminal delays. I believe these steps will substantially correct the inequalities which now exist and will put the compensation for freight train service upon a much fairer basis than now exists.

743 "I am therefore willing to establish December 1, 1919, the time and one-half for overtime in road freight service provided the train and engine men will accept such a basis in lieu of all special allowances and arbitraries of every character and will do this for the railroads as a whole."

Q. As I understand, Article 6-(b) of the Supplement 25 effectuated the proposition there declared by the Director General?

A. That is correct, sir.

744 Q. Do you know of any provision in this present contract that states or implies that a conductor is en-

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titled to an additional day's pay for performing any service en route between his initial and his final terminal?

A. No, sir, there is no such provision in the agreement.

Q. Are there any provisions in the contract which allow additional pay for performing any service en route between the initial and final terminal?

A. Yes. Article 15 captioned "Switching" makes provision for allowing additional compensation under the circumstances referred to in the Article, one of which being a provision to allow a conductor in through freight service, local freight pay for performing switching service en route not incident to or part of his train movement. For example, if a conductor in through freight service between Charleston and Columbia has a car of freight to be set out and placed at some particular point on some designated station track, under Article 15 he would be entitled to local freight pay for the entire trip. In other words, he would receive local freight pay for 128 miles, which I understand is the distance between Charleston and Columbia, at the higher rate of pay.

Q. That is because that is the provision of the contract?

A. The contract makes specific provision for making that payment. Provision is also made in the contract, Colonel, for payment on somewhat different basis in the event a crew is tied up on line of road under the Hours of Service law. That is covered by Article 23 of the contract.

Q. Those are certain specific provisions for additional pay, as I understand you to say there is no pro-

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700 vision in the contract for an additional day's pay for performing services en route between the initial terminal and the final terminal?

A. That is correct. The contract does not make allowances for an additional day for some service performed en route; provision being made only for the higher rate of pay and for payment on the basis specified in Article 23 when the Hours of Service law comes into play.

700 Q. In the supplemental claim tickets which are in evidence, and as to which you testified, the conductors refer to this movement for which they claimed an extra day's pay as a side trip. In Mr. Lawrence's letter, first letter and letters subsequently I believe, he refers to it as a lap-back trip. In the answer it is referred to as a side trip or turn-around trip. Will you explain these different movements and indicate whether or not the operation at Pregnall now in dispute comes under any of these classifications?

701 Mr. Willmarth: It is objected to as invading the province of the Court, and calling for the conclusion and opinion of the witness and in no manner binding on this defendant; and may my objection stand to all similar testimony.

The Court: I'll have to overrule the objection.

702 A. Apparently from the General Chairman's letter, he was in doubt as to exactly what the service was since he contended it was a side trip in one instance or a so-called turn-around run in the other. In other words, he apparently didn't know what it was himself or wasn't willing to admit it. Anyway, at the time this dispute arose there was no provision made for covering lap-back trips in the agreement. On July 30, 1945,

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we negotiated an understanding with the four train service organizations, making provision for allowing additional compensation for making so-called lap-back trips. The fact that that agreement was negotiated in—

Q. One minute. Under that agreement what is the definition of a lap-back trip?

A. I would prefer to read it, Colonel.

Q. Do that. I hand you a memorandum of understanding. As I understand, this is a memorandum of understanding which contains the understanding between the railroad and the Order of Railroad Conductors as to what is a lap-back trip; is that right?

A. Yes, sir, that is correct.

Q. Will you read the definition which was agreed upon for a lap-back trip?

A. "Where the phrases 'lapback movements' or 'inside turns' are used in this Memorandum of Understanding, the words mean the turning back of a crew for a distance of one-half mile or more in one direction, provided, however, that in the case of shoving trains, the distance specified in this paragraph shall be one-quarter mile in one direction instead of one-half mile as hereinbefore specified.

"The turning back of the crew must be:

"(a) Over territory previously operated over

"(b) Between terminals on a straightaway run from one terminal to another terminal, or between terminal and turning point or between turning point and starting terminal on a turn-around run from a terminal to an intermediate point and return to the starting terminal.

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757 " (c) For the purpose of performing additional service not a part of the continuous trip, such as—cutting off to assist other trains—returning to station last passed after departing therefrom to perform service that could have been performed before train departed from such station—thereby interrupting such continuous trip."

Q. Does the operation here in any way come under that definition?

A. No, sir, it does not.

758 Q. So this is certainly not a lap-back trip?

A. It is not under this memorandum.

Q. With reference to turnaround, I think that is defined in Article 8, isn't it, of the contract?

A. A turn-around run is defined in Article 8.

Q. And that is what?

759 A. Article 8-(a) provides: "In through freight or mixed train service, a turn-around run is a run from a terminal to an intermediate point and return to the starting terminal, and not less than one hundred miles will be allowed for each such run, except as provided in section (b)." Section (b), of course, makes provision for allowing pay on continuous time basis when more than one turn-around run is made out of the same terminal. In other words, paragraph (b) of Article 8 is in effect an exception to paragraph (a).

Q. Does this movement which we have here at Preg-nall come under that definition as a turn-around run?

A. No, sir, it does not.

760 Q. In another place they call it a side trip. What is a side trip? Is there anything in the contract about "side trip"?

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A. There is nothing in the contract relating to side trips. However, in railroad circles it is generally understood that a side trip is a trip or a side run made by a crew in making a straightaway run or a turn-around run from some intermediate point between the two terminals or between the terminal and the turning point out on to a branch line or main line track to a station, a yard, or something similar, and returning to the starting point. And of course the crew would continue on the continuous trip.

Q. Can you give an illustration?

A. Yes, I think a good example of that would be this: for example, if a crew operating, say, between Charleston and Columbia were to stop at Foxville and run up to Kingville and back to Foxville and continue on to Columbia, the movement from Foxville to Kingville and return would be a side run, a so-called side trip.

Q. The run actually would be from Kingville to Foxville, wouldn't it?

A. You are correct, Colonel.

Q. In other words, Kingville would be the station on the—

A. On the main line and Foxville would be the station on the other main line. But the run would be made from Kingville to Foxville and return to Kingville, and that would be a so-called side run or side trip as generally understood in railroad circles.

Q. Is there anything in the operation here at Peggall that is in dispute that would come under the definition of side trip?

A. No, sir, there isn't a thing, Colonel.

Q. Mr. Cox, what is understood by "assigned" run?

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766 A. When a new run is established it is customary and is a requirement under the contract to post a bulletin so that the employees may bid. A conductor bids on the run and is assigned by reason of his qualifications and seniority and that is his assignment. He is entitled to go out on that run when it is scheduled to depart. And he, of course, establishes his home at the initial terminal, and if it ties up at some outlying terminal, such as a run between Charleston and Columbia, he would establish a place to board in Columbia if he had a layover there of any length of time. But he would know when he would be scheduled to depart from his home terminal and from his away-from-home terminal.

Q. The testimony here is that on an assigned run such as this run between Charleston and Branchville, which was bulletined as the testimony shows, it would include all switching operations between those points with reference to a local freight train.

767 A. Yes, that is correct. When a man bids in an assigned run it is understood. He knows it and everybody on the division knows it. He is to perform all service on that particular run.

Q. Suppose a man makes his run according to assignments, say from Charleston to Branchville, and is then required to go on beyond that point, beyond his terminal and then to come back. What would be the effect of that on his rights under the contract?

768 A. Well, the contract contemplates that runs or trips be made from one terminal to another terminal or from a terminal to returning point and return, of course. In a situation of that kind the contract guarantees the man pay for at least 100 miles for a trip from

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Charleston to Branchville. If he goes beyond Branchville he, of course, is operating out of his terminal and the fact that he left his terminal and came back to his terminal in the direction of Columbia, for example, would entitle him to pay for a day for that service. Because it would be a trip from a terminal, Branchville, to some intermediate point and return to Branchville, the terminal.

Q. Suppose the additional duty required of him after he arrived at his terminal does not necessarily involve what you have stated amounts to a turn around run, as I understand, but is some other additional service outside of his assigned service. How would that be handled under the contract?

A. Some service might be performed in an emergency situation. A man might claim pay for an additional day or two additional days. Those cases are decided on their merits. It depends on the circumstances in each particular case. And we try to go beyond the specific provisions of the agreement and allow men pay for what we think they are entitled to as a matter of justice and equity. We pay men in many instances more than they are entitled to under the contract because of some special service that they might perform. But those settlements are made on the basis of what we think they are justly entitled to. They are settled on the merits of the particular case.

Q. Is there any such situation as that involved here, Mr. Cox?

A. No, sir, there is no such situation.

Q. If you'll turn to page 67 of your contract and please read the terms of the agreement and statement there under "Terms of Agreement."

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773 A. Under the "Terms of Agreement" appears the following, and I quote: "This agreement supersedes and cancels all former agreements but does not, except where rules are changed, alter former accepted and agreed to practices, working conditions or interpretations."

Q. Does that provision have significance with respect to conductors in local freight service who are required to perform industrial switching?

774 A. Yes, it does. Conductors have always performed industrial switching ever since we have had a contract with the conductors' organization and this rule merely has the effect of bringing forward those practices. It brought them forward and preserved them.

Q. Who are the parties to this contract you refer to?

775 A. The parties are the Southern Railway Company, and the contract was signed on behalf of that company by Mr. C. D. Mackay, Assistant Vice-President, and the Order of Railway Conductors, and the contract was signed on behalf of the conductors' organization by Mr. J. T. Lawrence, General Chairman. The conductors' organization is of course a duly accredited representative of conductors for purposes of the Railway Labor Act on the Southern Railway.

Q. That is what you call collective bargaining?

A. Yes, sir.

Q. That is the correct title there, the Order of Railway Conductors of America, isn't it?

A. Order of Railway Conductors of America is the correct title, yes, sir.

776 Q. The testimony is that the rate of pay for the conductors at the time this suit was brought was \$9.10. If the conductors should be allowed a day's pay for

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each additional day's pay claimed, what would be the annual additional cost to the Southern Railway Company for conductors alone?

A. Two thousand eight hundred forty-eight dollars a year. That is arrived at by multiplying \$9.10 per day times 313; 313 being the number of working days in a year.

Q. The train not only has the conductors but engineers, firemen, and other trainmen—they have similar provisions in their contracts as here?

A. Yes, sir, that is correct.

Q. If those crews make similar claim what would be the additional cost?

A. I figured that out and it runs around almost eleven thousand dollars a year in addition to the \$2,848.00. By recollection, it is \$10,979.00, or thereabout.

Q. How many of these claims have been filed?

A. Numerous claims have been filed.

Q. They have continued to file them regularly?

A. Yes, sir.

Q. That is, the conductors?

A. The conductors.

Q. Have the other crew members filed any claims?

A. If they have, they have never been appealed to my office, Colonel. I understood at one time that three or four engineers filed some claims but they were not appealed. Neither were the claims of the trainmen appealed either, according to my recollection. Only the claims of conductors.

Q. Then you mean if they did file any claims and they weren't appealed, then they would be barred?

A. Be barred by the Statute of Limitations rule in the respective agreements.

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701 Q. To your knowledge have any other similar claims been filed at other points?

Mr. Barnwell: I withdraw the question.

Q. As I understand, the present rate of conductors' pay is \$10.58?

A. Ten dollars fifty-eight.

Q. Should be a corresponding increase in the cost under the present conditions?

A. Yes, sir, that is correct.

702 Q. Did I understand you to just testify that the conductors are continuing to make these claims in spite of the fact that the rule has been made denying the claims?

A. That is correct, sir.

Q. Do you know of any other procedure you could follow to secure an additional interpretation of the controversy than this present suit?

A. Yes. The conductors' organization could negotiate a revision of the agreement if they desire to do so.

703 Q. But I mean adjudication. Do you know of any other procedure you could follow to secure adjudication?

A. No; there is no other that I know of.

Q. At the present rate of pay what would be the additional annual cost to Southern Railway per year for conductors alone?

A. Approximately \$3,311.00.

Q. What is that?

A. Approximately \$3,311.00.

704 Q. That would be on the straight pay without overtime?

A. That would be the cost of the additional day claimed.

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Q. Additional day claimed?

A. Yes, sir.

Q. In addition to that you would have to pay the regular pay and overtime if this is sustained, isn't that correct?

A. Yes, sir. That is correct. And on the basis of two hours overtime there a day, it would run around \$25.00 a day. I understand they make overtime almost every day.

Q. Have you figured out what that would amount to in a month and a year?

A. That would be approximately \$5,584.00 per month, or \$67,006.00 a year.

Mr. Barnwell: You have got that wrong, Mr. Cox. Check your figures.

A. Yes, I see I made an error. It would be approximately \$653.38 a month, or \$7,840.56 a year.

Q. Mr. Cox, where there is no article in the agreement to support a claim, what would be the remedy of the conductors if they have a valid grievance?

A. They could come in and negotiate a change in the agreement. That will be done under the provisions of the Railway Labor Act.

Q. They always have that right?

A. They always have that right; yes, sir.

Q. In the course of your testimony I understood you to say you at one time actually had been a member of the Fourth Division of the National Railroad Adjustment Board. What is the Fourth Division?

A. The Fourth Division is one of the four divisions of the Board.

Q. And that has special charge of what?

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790 A. They have jurisdiction over disputes involving yard masters, dining car employees, and miscellaneous classes; such as police department employees and people of that classification. In other words, it is a catch-all division. They decide cases involving disputes of organizations not coming under the jurisdiction of Divisions 1, 2, and 3.

Q. And which is the division that has special charge of operations?

790 A. Division 1 decides disputes involving train and engine service employees.

Q. When you were on the Fourth Division did you or not still attend the meeting before the Board?

A. Yes; I did.

Q. Are you familiar with the tradition of business before the Boards, various boards?

791 Mr. Willmarth: That is objected to as irrelevant and immaterial and incompetent; and foreign to any issue in this case, and in no manner binding on this defendant. May my objection go to all similar testimony.

The Court: What do you mean, Mr. Barnwell?

Mr. Barnwell: We want to show that the labor board is terribly cluttered up with work and cannot proceed with its work. I wish to show the condition in the labor board is such that you wouldn't get a hearing for years. I think that would be competent.

The Court: I think we are getting far afield. I'll let you put it in the record, though, if you want it.

792 Mr. Barnwell: That was specifically one of the questions.

The Court: Go ahead. I'll overrule the objection. Let's get it in the record.

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A. Yes; I had a general knowledge of the tradition of the board. They were four or five years behind with their cases.

The Court: How long ago was that, Mr. Cox?

The Witness: That was in 1934, 1944. I can quote the figures from the official report made to the president of the board showing how far behind they were.

The Court: Do you happen to know how they are now?

The Witness: Yes. They are still far behind and it would take, we estimate, two or three or four or five years to get a decision now. There is a big backlog of cases.

By Mr. Barnwell:

Q. These are the annual reports—

Mr. Willmarth: May it be understood my objection runs to this, too?

The Court: Yes.

Q. According to the official report for the fiscal year ending June 30, 1944, page 50 of the annual report of the National Mediation Board, what was the condition of the docket of the First Division, National Railroad Adjustment Board, for that year?

A. The number of cases pending on docket July 1, 1943, 5,873; number of cases received and docketed, 2,050. That is a total of 7,923. Number decided by issuing awards without a referee, 998; with referee, 375. That makes a total of 1,373. Number withdrawn, no awards issued, 1,412. That makes a total of 2,785. Number pending June 30, 1944, 5,138; number of cases heard, 358; number of cases deadlocked, 288; number of cases heard and not decided, 652; number of cases

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awaiting hearing, 4,503. Total cases docketed June 30, 1944, 18,861.

Q. Now, for the year ending June 30, 1945, from the next annual official report.

A. Number of cases pending on docket July 1, 1944, 5,138; number of cases received and docketed, 2,233; that being a total of 7,371. Number decided by issuing awards without referee, 810; with referee, 411; that being a total of 1,221. Withdrawn, no awards issued: prior to docketing, 186; after docket numbers assigned, 1,244; that being a total of 1,430. Plus 1,221, being a total of 2,651. Number pending June 30, 1945, 4,720; number cases heard, 179; number of cases deadlocked, 489; number of cases heard and not decided, 1,152; number of cases awaiting hearing, 3,256; number of cases received and not docketed, 312. Total cases docketed June 30, 1945, 21,097.

Q. For the year ending June 30, 1946.

A. Number of cases pending on docket July 1, 1945, 4,720; number of cases received and docketed, 573; that being a total of 5,293. Number of cases decided by issuing awards without referee, 141; with referee, none. Withdrawn, no awards issued, 2,009. That being a total of 2,050. Number pending June 30, 1946, 3,143; number of cases heard, none; number of cases deadlocked, 48; number of cases heard and not decided: heard, 128; hearing waived, 945; total, 1,073. Number of cases awaiting hearing, 1,968. Total cases docketed June 30, 1946, 21,667.

Q. From practical experience what would be the length of time before you could expect a decision from the First Division?

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A. It would be several years; two or three years at the minimum. And it is doubtful that a decision could be rendered in that length of time. In fact, we have cases pending that have been before the Board for considerably longer period than that—five or six years.

Q. What is the effect, so far as binding effect, of a decision? What is that?

A. The decisions—

Mr. Willmarth: That is objected to as calling for a conclusion of law. It is the opinion of this witness and in no manner binding on this defendant. We ask that our objection go to all similar testimony.

The Court: How about that, Mr. Barnwell? Isn't that a matter of law?

Mr. Barnwell: Well, sir, it probably is, sir. I mean to say the Act itself shows it is not final.

The Court: The Railroad Labor Act must tell about it.

By Mr. Barnwell:

Q. What is the method of procedure before the First Division?

Mr. Willmarth: That is objected to as immaterial and irrelevant.

Mr. Barnwell: Their contention, your Honor, is that they are entitled to go before the Labor Board and that that is a full judicial procedure. I want to show just what that procedure is. It is anything but judicial.

The Court: I believe we are getting a little afield there, Mr. Barnwell, it seems to me.

Mr. Barnwell: Well, if you'll stick to that view it is satisfactory to me, but I think you're going to find that they are going to endeavor to bring in a great

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deal of testimony, in my judgment. We'll withdraw that and wait until we see what happens on the other side. We'll withhold any further testimony. That is all.

Cross Examination

By Mr. Willmarth:

Q. Mr. Cox, do you know how many cases the Southern Railway Company presently has pending before the First Division of the National Railroad Adjustment Board?

A. No, sir, I can't give you the exact number.

Q. You just said in your testimony, didn't you, that you had many cases lying up there?

A. We have cases, yes, sir.

Q. Did you make that assertion from guess or from your knowledge?

A. From my own personal knowledge and having written some of the submissions myself.

Q. Then I have just asked you to estimate for us how many you have presently pending before that First Division.

A. Offhand, I would say 25 or 30.

Q. Twenty-five or thirty cases pending now by the Southern Railway?

A. Yes, sir.

Q. You are not including the subsidiaries in the Southern Railway?

A. That estimate might include some of the others. We consider them all as one group.

Q. What subsidiaries are owned by the Southern?

A. Well, the Southern Railway System is composed of a number of associated railroads.

Q. Name them.

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A. They are not owned by the Southern.

Q. Name them.

A. The lines comprising what is generally known as the Southern Railway System are the Southern Railway Company, the Cincinnati, New Orleans and Texas—Pacific Railway Company, the Alabama Great Southern Railroad Company, the New Orleans and Northeastern Railroad Company, the New Orleans Terminal Company—

Q. The New Orleans Terminal Company, is that a through line or just a terminal?

A. It is a terminal company.

Q. It wouldn't be a railroad?

A. It is a part of the Southern Railway System.

Q. I am asking you for the through class one railroads comprising the Southern Railway System.

A. In addition, is the Georgia, Southern and Florida Railway Company.

Q. You named the New Orleans and Northeastern, haven't you?

A. Yes, sir, I did.

Q. Cincinnati, New Orleans and Texas Pacific, and the Alabama Great Northern, Georgia Southern?

A. The Alabama Great Southern Railroad Company and not the Alabama Great Northern.

Q. And the Georgia Southern and Florida?

A. Yes, sir, right.

Q. That is four subsidiaries and the Southern Railway?

A. We are not subsidiaries.

Q. I am not quibbling with you. That is what comprises the Southern Railway System, does it not?

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Q. A. Those lines do comprise what is generally known as the Southern Railway System.

Q. Do you know of any Board cases pending before the First Division on the New Orleans and North-eastern?

A. I can't name the cases, Mr. Willmarth.

Q. But you think there may be?

A. I think we have some there. We did the last time I checked the records.

Q. How about the Cincinnati, New Orleans, Texas, Pacific?

A. We have some cases there, I am quite certain. We did the last time I checked the records.

Q. Been there four or five years?

A. Yes, sir.

Q. What about the Alabama Great Northern?

A. I don't know a thing about the Alabama Great Northern.

Q. And how about the Georgia Southern and Florida?

A. We have, I believe, several cases on the Georgia, Southern and Florida Railway Company.

Q. When we talk about the Southern Railway, we are talking about a distinct unit, are we not?

A. We are talking about the Southern Railway Company.

Q. That is who you are employed by?

A. I am employed by all of the companies. I happen to be carried on the Southern Railway payroll.

Q. These men that we are discussing their claims in this suit are employed by the Southern Railway Company, are they not? Or are they employed by all of these companies?

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A. The claimants are conductors on the Southern Railway Company and, of course, are employed by Southern Railway Company.

Q. Does that company have any cases presently pending before the First Division of the Adjustment Board?

A. I can only recall one in particular.

Q. What one was that?

A. It is a claim involving a fireman at Birmingham.

Q. That is the only claim you can recall that is pending before the First Division?

A. It is the only one that I recall at this time involving Southern Railway Company.

Q. Don't you know that this very suit is now pending before the First Division, involving these claims?

A. I know that the Order of Railway Conductors made an attempt to submit it to the First Division of National Railway Adjustment Board. I say—

Q. Haven't they submitted, and is the question—

The Court: One minute.

Mr. Barnwell: He is trying to go into the very question your Honor has already ruled on.

Mr. Willmarth: I have got a right to impeach the witness, your Honor. He has gone into it in his direct examination, what were pending before the First Division.

The Court: I think you have a right to ask the question but, I mean, he has a right to be allowed to answer it and you are stopping him from answering. Just ask him the question and let him say yes or no.

Mr. Barnwell: The question, your Honor, as I understand it, is this—

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Mr. Willmarth: May I ask the question? I'll withdraw and start it over.

Mr. Barnwell: He has withdrawn the question. I have nothing further to say.

By Mr. Willmarth:-

Q. Mr. Cox, did not the Order of Railway Conductors file a submission of this very dispute with the First Division of the National Railroad Adjustment Board?

A. The Order of Railway Conductors notified the Adjustment Board that they desired to submit the case to that Board and the Order of Railway Conductors actually made a submission.

Q. What was that last?

A. The Order of Railway Conductors actually prepared their submission and sent it to the Board and the Secretary of the Board sent the Southern Railway a copy of the conductors' submission.

Q. And was not the Southern Railway Company advised by the Board that the submission filed by the Order of Railway Conductors had been docketed by the First Division?

A. I believe the Secretary did assign a docket number. But not to my knowledge has the Board ever taken any official action.

Q. I didn't ask you that.

Mr. Willmarth: And I move to strike that part of his answer, that not to his knowledge, as unresponsive to the question.

The Court: That is all right. Strike it out. He testified that a docket number had been assigned as he understood.

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By Mr. Willmarth:

Q. You know that docket number?

A. No, sir, I do not.

(A document was marked Defendant's Exhibit "E" for identification.)

Q. Mr. Cox, I hand you what the reporter has marked as Defendant's Exhibit "E"—

The Court: That is only for identification. It is not evidence.

By Mr. Willmarth:

Q. It is not evidence. And I'll ask you if that is not the submission—

Mr. Barnwell: I object. I haven't seen it. He is asking him to testify to the contents of a paper I haven't even seen.

Mr. Willmarth: I have no objection to Mr. Barnwell seeing it.

(Document handed to Mr. Barnwell.)

Mr. Willmarth: While we are waiting, your Honor, I might say that we have previously given plaintiff notice to produce all papers that are a part of this submission which may have come to us, copies to them or from the Board. And, of course, they have their originals; so that we have given them notice as to all papers here. This is certified by the Secretary of the First Division of the National Railroad Adjustment Board as being the submission and including all records in his record.

Mr. Barnwell: Your Honor please, this is a certified copy of a record of the National Railroad Adjustment Board, First Division, showing that the Order of Railroad Conductors in November, 1945, four months after the commencement of this suit, undertook to file a claim

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before the Railway Labor Board. How this witness can identify a certified copy of a record, which is the first time we have ever seen or heard of it, I don't know. He can examine him on certain phases of it if he wishes to and ask us to produce records. But to say he can be cross examined on a record without introducing it in evidence, I object to its being introduced in evidence. I think it is irrelevant to the case.

Mr. Horlbeck: He hasn't offered it in evidence. He wants to give this data to the witness, let the witness refresh his recollection as to his files from it and cross examine him.

Mr. Barnwell: He can examine him as to any letters which we may have written or which Mr. Cox may have written in there, not as a part of a certified copy of a record filed four months after this suit was brought, but as copies of a letter which he may have written at a designated time and place. He can say: "Did you or not such a day write such a letter? Is this your letter?" He has given us notice to produce those letters, I think, and we are perfectly willing to let him produce the carbon of any of them he has. But in this roundabout way to undertake to try by producing a certified copy of a record in Washington, concerning a matter which so far as that record is concerned wasn't filed there until four months after this suit was brought, in that way try to get that record into the testimony as to it, we think is inadmissible. Your Honor has already ruled on the motion with reference to the amended answer.

The Court: It is no defense.

Mr. Barnwell: It is no defense.

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The Court: I don't know what the cross-examination is going to be until I find out. Of course, the witness just like every other witness is sworn to tell the truth as he knows it. But if a question is asked him that he doesn't know, all he can say is, "I don't know."

Mr. Willmarth: I think we can expedite this, Colonel Barnwell. Have you produced letter of December 4, 1945, to Mr. C. D. Mackay, Assistant Vice-President, Southern Railway Company, from T. S. MacFarland, Secretary of the National Railway Adjustment Board?

Mr. Barnwell: Yes, sir, we'll produce it today.

By Mr. Willmarth:

Q. Mr. Cox, let's pass to another point now for the moment. I take it, there is no dispute here but what you are subject to the Interstate Commerce Act and the Railway Labor Act?

A. The railroads are subject to the Interstate Commerce Act and the Railway Labor Act, yes, sir.

Q. That is, the Southern Railway, the party plaintiff in this action?

A. The Southern Railway is subject to those two Acts.

Q. And you know whether the Southern Railway has complied with Section 28 of the Railway Labor Act which requires: "Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the National Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this Act," and so forth?

A. Yes, sir, the Southern Railway Company has complied with that provision.

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Q. The Southern Railway Company, as a matter of fact, has itself filed submissions before the First Division of the Adjustment Board, has it not?

A. In one instance I recall it did so.

Q. It took the initiative and took the employees to the Board for determination of the dispute, did it not?

A. Yes, it did.

Q. And that Board, generally speaking, is constantly and under statute concerned with the construction and interpretation of these contracts, is it not?

A. That is one of the Board's functions.

Q. Disputes that arise on the property, arising out of some variance of the operation that occurred and it is claimed by the men that violate their schedule and rules; is that not true?

A. The Board decides disputes submitted to it, yes, sir.

Mr. Barnwell: Your Honor, counsel has objected to my undertaking to ask the witness a question of fact involved in the contract. Isn't he doing exactly the same thing? I object.

Mr. Willmarth: I'll go on to something else.

Q. What did you mean when you called yourself the highest operating officer on the Southern?

A. I mean by that that I am the highest officer designated by the carriers—that is, one of the highest to handle disputes involving the employees.

Q. After they have come to you and been negotiated, and so forth, they go on to the Board in the usual process, is that not correct, under Section 3-(i) of the Act?

A. If the employees submit the case to the Board, that is the procedure followed.

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Q. And the Act requires them to process it up through the various hierarchy officials of the Southern Railway before they can submit it to the Board, does it not?

Mr. Barnwell: All that is covered by the Act. He is asking this witness to give an opinion, your Honor.

Mr. Willmarth: I am asking this witness to apply it to the Southern Railway.

The Court: It applies to every railroad in the whole United States.

Mr. Willmarth: But I want to know what officials they have to go up through on the Southern Railway?

The Court: What has that got to do with this issue here before us, please? I mean, it is true. Of course, it is all true. We are just rolling empty barrels around here talking about what is in the Railroad Act. We all admit—the Railroad Act is here—the railroad is under it; the conductors are under it. All of that is true. Why put all that in the record? We are just wasting time.

By Mr. Willmarth:

Q. And these claims were in the process of negotiation through your hands or through some officer's hands, at the time this suit was filed; is that not correct, Mr. Cox?

A. The claims were appealed to our office and discussed in conference, and payment declined. There were additional claims filed, following the filing of the original claims, of course.

Q. There has been negotiations concerning this very dispute, has there not, both before and after the time you filed this action?

A. Discussions have been had with the employees, yes.

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813 Mr. Barnwell: I object. He certainly can't go into the question whether there have been discussions between the parties over a proceeding after the suit is brought.

The Court: I shouldn't think there would be any doubt about it, not going into what those discussions may have been.

Mr. Barnwell: I mean if there has been.

The Court: Anybody that has a dispute, usually there is a good deal of talk about it.

846 Mr. Willmarth: On direct examination they have discussed their discussions, your Honor, that they had with us.

Mr. Barnwell: Yes. We put that all in evidence.

Mr. Willmarth: I am simply cross examining him on it.

Mr. Barnwell: I mean, the lawyers may discuss a suit after the suit is pending for various purposes; but I don't think you can go into the question of what those discussions were.

By Mr. Willmarth:

847 Q. Mr. Cox, you have computed for the Court some sums of money that this would cost the Southern Railway, have you not?

A. Yes.

Q. And you base those computations on this trip being made 313 days a year?

A. Yes. That was the basis of my calculation.

Q. And that trip is actually not made more than one or two times a week, is it?

848 A. Sometimes I understand the trip is made almost every day; then there might be a period when it is made just once or twice a week.

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Q. And a period when it might not be made at all?

A. That is true. But we have no way of gauging the business that we'll get from that plant.

Q. So that your computations are not based on the time of a regular trip up there, simply if it was regular but not on the actual irregular trips that are made, isn't that correct?

A. I base it on 313 days a year. That was an estimate based on the crew going to the plant every day.

Q. Now, if it is material, is the Southern Railway doing that work out of the goodness of their heart?

The Court: What work do you mean?

Mr. Willmarth: I mean, are they hauling the cars for these plants up there at Pregnall out of the goodness of their heart?

A. No; the Southern Railway receives pay.

Q. Let's turn to something else. You talked about a run being defined by the bulletin, did you not?

A. Some mention was made of that, yes, sir.

Q. And you said these rules measured a day's work, did you not?

A. Article 5-(a) as it defines—

Q. Measures a day's work?

A. It defines the minimum measure of a day's work.

Q. And the bulletin defines the measure of the job, does it not?

A. The bulletin indicates that there is a vacancy and a man is privileged to bid on the vacancy. He may bid it in. Or he may not do so.

Q. Will you answer my question yes or no, Mr. Cox? The bulletin defines the measure of the job, does it not?

A. It defines the starting time, the points between which the train will operate.

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853 Q. Will you just answer my question, whether that is correct or not?

A. I am trying to answer your question and I will do so if you'll let me.

Q. Just a moment. Can you answer that question yes or not?

A. No, I cannot.

The Court: There are a lot of questions you can't answer yes or no. "When did you quit beating your wife?" You can't answer that yes or no.

854 By Mr. Willmarth:

Q. Isn't it generally true that it is agreed between the railroad and the employees that the bulletin measures the job they are to perform?

A. There is no such understanding between the company and the Order of Railway Conductors.

Q. Never has been?

A. Never has been, no, sir.

Q. All it means is so they will know when he will go down to the train and get on his train?

855 A. There is a provision in the contract—

Q. So he will know when to go off and get it in, is that all that bulletin means to you?

A. You are asking the questions so fast I can't answer one until you ask another one.

Q. Didn't you say that the bulletin defined when he started and when he ended? That is all it means, is it, that the conductor knows that he has got to be there in order to get on that train at a certain time and knows when to get off?

A. That isn't all the bulletin means, no, sir.

856 Q. It also defines the run that he is to make, does it not?

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A. It indicates the starting terminal and the terminating terminal.

Q. And it defines the measure of his job, does it not, then, as between those two terminals?

A. It defines the points between which he will operate, Mr. Willmarth.

Q. Is that correct, as between two terminals on a straightaway run?

A. That is right. It indicates the initial terminal, the final terminal, and it is customary to show the starting time.

Q. You said if he went out beyond the terminal that you would recognize and pay him an additional day, if he went out say five miles beyond his final terminal; is that correct?

A. If in this particular case the conductor assigned to the local operating between Charleston and Branchville went beyond Branchville for some particular reason and it would only be done once in a blue moon, he would receive an additional day's pay for making that particular trip.

Q. That would be true if he only went five miles out beyond it, would it not?

A. Well, I think it would depend on the circumstances, Mr. Willmarth. Cases of that kind are usually—

Q. The Southern Railway has frequently paid claims, have they not, for an additional day for running a man out beyond his terminal?

A. Yes.

Q. How did you define a lap-back?

A. I read from the understanding we have with the four train service organizations. I shall be glad to

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341 read it again if you desire me to do so. It speaks for itself.

Q. Don't you know yourself what a lap-back is? You have defined lots of other things here for us without reading.

A. Yes, I know what the lap-back is. It is, as defined in the memorandum of understanding negotiated—

Q. Let's just have it in your own words.

A. The turning back of a crew must be over territory previously operated over.

342 Q. All right.

A. Between terminals on a straightway run from one terminal to another terminal; or between terminal and turning point or between turning point and starting terminal—

Q. Just a minute. It won't be necessary to read it all.

A. I should like to answer your question.

343 Q. Generally speaking, it occurs where a man is run and then turned around back over the same territory the distance—

A. To perform some additional service not a part of his routine work.

Q. His routine work is to start at this terminal and go down that railroad to the next terminal?—

A. And perform all service en route.

344 Q. But when you are turning around, starting back this way, that is additional service?

A. Not in every case, no, sir.

Q. Prior to this lapback memorandum didn't your Southern Railway Company recognize and pay claims for an additional day for turning a man on his run, lapping him back, from time to time?

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A. Some claims were paid; some without precedent or without prejudice against the company or the employees.

Q. But paid and recognized. Very well. How did you define a side trip?

A. I just defined that as being a side run from some intermediate point between two terminals or a terminal and a turning point to another intermediate point over the main line or over a branch line and returning to the starting point and continue on the trip to the final terminal of the run. That is generally understood to be a so-called side trip, even though it is not defined in the agreement.

Q. It may be we don't understand each other, Mr. Cox.

A. Perhaps we don't.

Q. Perhaps I don't follow you. Do you mean to distinguish between a side trip and a lapback?

A. Yes, sir.

Q. And in what respect?

A. They are two different things altogether.

Q. How are they different? That is what I am trying to obtain from you; what is your concept of the difference?

A. A turnaround run, or lapback as we call it, is made over main track between the terminal or turning point, over territory previously operated over, for the purpose of performing additional service not a part of that particular trip from terminal to terminal or terminal to turning point and return to starting.

Q. Let's have a side trip.

A. A side trip I have just defined, but it must be made over main line track or branch line track. It

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cannot be made over an industry track such as involved in this dispute.

Q. What I am trying to get, is when you refer to this side trip and over this main line track or branch line track, the track to which you are referring to isn't the track between the two terminals, is it?

A. The track I have reference to, Mr. Willmarth—

Q. Some track going off?

A. Is a main line track running from one station to another station, or a branch line running from one station to one or more stations.

Q. Mr. Cox, I am not trying to get you to call it by some other name. I am just trying to get, is it a track which branches off the main line, treating the main line as a scheduled run?

A. Not necessarily. Two main lines—

Q. Where does it go?

A. Two main lines can cross, Mr. Willmarth, and a side trip can be made in either direction from a point over the main line.

Q. I see. That is a side trip. Now, you recognize that, do you, and pay additional day's pay for such side trips?

A. It all depends on the circumstances. If the man is assigned to make a side trip he gets nothing additional except the miles he runs. That is a well-established principle.

Q. Those circumstances have to be applied under the scheduled contract, do they not?

A. Yes; they do.

Q. And when he makes this side trip under these circumstances to which you refer, under what rule do you pay him this extra day?

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A. If he is assigned to make a side trip he is paid under 5-(a), 6 and 7 and Article 4. 872

Q. Regular pay rule?

A. His pay starts from the time he goes on duty and continues until he goes off duty at the final terminal.

Q. Let's assume that this man is assigned for a run of 70 miles between A and B. And there is a line crossing there that you have referred to, crossing that line between A and B, and when he reaches that—and this is not within his assignment—you decide to run him down to C, a distance of five miles, and back and then on his run. Would the Southern recognize a claim there for additional compensation under your statement of the rule? 873

A. If that crew were in through freight service and were notified before leaving the terminal that that service would be performed, he would be paid on a continuous time basis for 100 miles because it would be less than a hundred. You said the distance between terminals was 70. The distance down on this adjoining was five down, it would be five back; that would be ten more. So he would get paid for 100 miles and overtime if he made more. 874

Q. If it was local freight service would you pay him additional time?

A. If the local freight crew were assigned to make this run, this side run that you refer to, he would not get anything additional. He would be paid on continuous time basis from the time of going on duty until going off duty. 875

Q. I am not sure we understand each other.

A. Perhaps we don't.

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JORDAN WILEY COX

Q. I am desperately trying to reach an understanding. This crew is assigned between A and B; nothing is included in their assignment with reference to this side trip to which you have referred. At some time during that trip between A and B they are ordered to run over here on this cross line to C, a distance of five miles, and back and then on to their terminal B. This is a local freight crew operating between A and B.

A. And he isn't assigned to make this?

Q. There is nothing in his assignment as to C up here on this other line.

A. On another main line or a branch line? In a situation of that kind, since that would not be included in his assignment, it has no mention made in the bulletin and it is over a main line track, a branch line track, as distinguished from an industrial spur track, we would pay the man additional compensation because it would be construed to be a violation of the agreement. It would be a penalty payment. There is nothing in the agreement that covers it at all.

Q. Under what rule would you pay him?

A. We would pay him under a practice we have.

Q. Just give it to him?

A. There is no rule in the agreement that covers it.

Q. The Southern Railway just gives the man that money?

A. Oh, he performs some service, Mr. Willmarth.

Q. But it has paid in times past an additional day's pay for that side trip, has it not?

A. If the crew is not assigned we have paid some additional payments of a day as penalties, because the men are run off their assignment.

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Q. And those payments of a day correspond exactly to the day's payments specified in these rules, did they not?

A. It indicates that he would get \$10.58 additional—

Q. And that was just coincident to the time they were paid?

A. You keep asking questions before I answer one. I can't keep up with you. If you'll let me answer the question, I shall be glad to do so.

The Court: Will you explain that now?

The Witness: In a situation of that kind, where an actual side trip is made over a branch line or a main line which is not included in the man's assignment; or in the case of a local freight, in the case of a through freight if he isn't notified before leaving the terminal, it has been customary to allow a man an additional day's pay. If overtime accrues on the trip that time consumed in making this so-called side trip is deducted. He isn't paid twice for that service.

Q. You deduct the time attributable to that side trip if it runs into overtime from the day you pay him, do you not?

A. That has been done, yes.

Q. Now, in this situation, Mr. Cox, that we have specifically here before us, where these men are assigned Charleston to Branchville and at intermittent intervals under the order of their train dispatcher run up to the plants above Harleyville; let's suppose that they determined to build those plant instead of six and three-quarters miles from Pregnall, twelve miles from Pregnall. Would you be taking the same position here that that was simply an industrial switching or spur track off the line?

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A. My position would be exactly the same; the length of the track has no bearing on it.

Q. And you would pay them exactly the same compensation?

A. If it is one mile or ten miles, it is still an industrial track.

Q. Now, your position would be then, as I understand you, that if they ran between Charleston and Branchville each day and on all the days that they didn't go up there they would be paid, would they not, a basic day excluding any compensation they might earn for overtime?

A. For straightaway trip, from Branchville to Charleston?

Q. They would get their basic day, would they not?

A. They would be paid for one day.

Q. And that would be true if that run were operating there and this plant had never existed, would it not?

A. Oh, yes. They would still have been paid on continuous time basis from one terminal to another terminal. Of course they would perform all service between the two terminals. That is part of the assignment.

Q. So when the plant was built, we'll say it was built up there twelve miles and that part added to their job, they go up there without any additional compensation simply under your theory that it is a part of their run; is that right?

A. That is correct. We construct industrial tracks all over the railroad, Mr. Willmarth. No consideration is given to allowing additional compensation just because another track has been added. Neither is anything taken away when you take up a track.

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Q. Let's see if your position is the same if that plant had been built up above Harleyville 25 miles from the main line. Just those plants alone.

A. My position would still be the same, Mr. Willmarth; still an industrial track.

Q. Would your position be identical to your position here had it been built 50 miles up and a line ran down?

A. You couldn't have a situation like that. You wouldn't have once in a blue moon. If you had plants that far away you would have sufficient service up there to justify the assigning of a crew to go from Charleston to the plant and back.

Q. It would be possible—I'm asking you just follow me in this flight of imagination—fifty miles.

A. You are getting far afield from the issue, though, Mr. Willmarth.

Q. Where do you draw the limit as to where the plant should be built or how far afield it can go?

A. There is no limit. But I draw the limit as to the length of an industrial track. We have them just a few hundred feet long and we have them five, six, eight, ten, eleven miles long.

Q. Fifteen, twenty, fifty?

A. I don't recall any industrial tracks fifty miles long, no.

Q. But your position would be identical, irrespective?

A. If it were an industrial track. But the chances are that it would not be an industrial track fifty miles long, Mr. Willmarth. If the railroad company constructed the track, or some corporation constructed it, the chances are there would be stations on it. If the stations were on it, it would be more or less—I suppose the public would be served—and the chances are if

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that situation existed it would be a branch line and not an industrial track.

Q. And what point would you begin calling it a branch line and not industrial track?

A. I wouldn't know, Mr. Willmarth. We have some branch lines 150 or 60 miles long.

Q. You mean the length would determine?

A. The length wouldn't have a thing in the world to do with it.

Q. But at some point in there it might get to be a branch line?

A. It all depends on the operation of the track; whether or not the public is served, a regular service maintained.

Q. In my illustration I gave you, nothing was served but the plants.

A. Well, I'd just say you wouldn't have a situation like that. You wouldn't have an industrial track fifty miles long.

Q. You can't answer my question?

A. I can say that the chances are 10,000 to one that you would ever have such a situation.

Mr. Willmarth: I think that is all.

Re-direct Examination

By Mr. Barnwell:

Q. I understood in your cross examination that Mr. Willmarth asked you whether you did the business of making this trip to Pregnall out of the goodness of your heart. And you said you got paid for it. Is there any rate involved in that when you say you got paid for it?

A. I meant by that, Colonel, that this revenue—freight is paid; the shippers pay.

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JORDAN WILEY COX

Q. B. KEISTER

Q. You don't get special pay?

A. No special rate. They pay tariff rates.

Q. The tariff is to Pregnall?

A. That is correct.

(Witness excused.)

The Court: I think we had better take about 15 minutes out.

(Fifteen-minute recess.)

O. B. KEISTER, a witness for the plaintiff, after being sworn, testified as follows:

Direct Examination

By Mr. Barnwell:

Q. Your full name is what?

A. O. B. Keister.

Q. How do you spell it?

A. K-e-i-s-t-e-r.

Q. When did you begin your railroading, Mr. Keister?

A. 1887; Southern Railway.

Q. Give us an account of what your experience as a railroad man is.

A. Continuous service for sixty years; '87 to 1947; starting as a messenger boy, holding position of telegraph operator, dispatcher, chief dispatcher, trainmaster, superintendent, general superintendent, general manager. Last twelve years as general manager. From 1927 to 1934 as general superintendent, Charleston Division was under my jurisdiction.

Q. In the many years you have been in this field in your offices have you had the opportunity to observe all types of operational practices?

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901 A. I have.

Q. Have your duties required you to familiarize yourself with the handling of matters involving contracts governing the employment of operating employees?

A. They have.

Q. Are you familiar with the contract governing conductors?

A. Yes, sir.

902 Q. Who has represented the conductors in the Southern Railway Company in matters arising under the contract?

A. General Chairman and the local chairman.

Q. Of what?

A. Order of Railway Conductors of America.

Q. And in handling the matter of claims of the conductors, negotiations were made with that organization?

A. That is right.

903 Q. How have the claims with the operating employees under this contract been handled?

A. Conductor handles with the superintendent—local chairman handles with the superintendent. If the claims are denied, then the General Chairman handles with the General Manager. And if declined there, he processes them on up to the personnel officer.

Q. And in the present case that personnel officer, last official of the Southern Railway handling it, was Mr. Cox, as he has already testified.

A. That is right.

904 Q. Are you familiar with the practices with respect to service on industry tracks or spurs?

A. I am.

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Q. What is the general practice for the local freight trains with reference to industrial tracks and spurs on their assigned run?

Mr. Willmarth: That is objected to as calling for opinion and conclusion and in no manner tending to prove practice on this run, and in no manner binding on this defendant. May the objection stand for further testimony along this line?

The Court: I'll have to overrule the objection.

A. It has always been customary for local freight trains to do all the work embraced within its territory; industrial tracks, house tracks, team tracks, loading and unloading freight, roadway work.

Q. Under this practice, so far as you know, has any claim by a conductor or other crew member ever been paid for extra day's pay over and above his pay for a service trip for performing switching on an industrial spur track?

A. No, sir.

Q. Referring to these supplemental tickets in evidence as Plaintiff's Exhibit No. 14, that is what the testimony here shows was a straightaway run or a local freight from Charleston to Branchville. Is the track on those tickets referred to as an industrial track?

Mr. Willmarth: Your Honor, that is objected to.

By Mr. Barnwell:

Q. What does it call them?

A. "Remarks. Side trip, Pregnall to Harleyville and return. Distance 13 1/2 miles."

Q. Assuming that track involved would be an industrial track, would the claim be allowed under the practice of the company in applying the contract as you know it?

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A. It would not.

Mr. Willmarth: That is objected to as calling for conclusion and opinion of the witness and invading the province of the Court.

The Court: Overruled.

Q. In railroad practice, under your testimony of your knowledge and experience, what is generally known as a straightaway run on local freight service?

The Court: That is in the contract, isn't it?

Mr. Barnwell: Yes, sir; but I just want to show that it is the same practice under the general practices, which has not changed—Article 5(a).

Q. Go ahead.

A. It is a run, a straightaway run, from one terminal to another terminal.

Q. Does that involve any service, any actions en route?

A. Performs all service in that territory.

Q. For instance, what?

A. Switching, industrial tracks, house tracks, team tracks, unloading freight, loading freight, doing road-way work.

Q. What is an industrial track?

A. It is a track serving an industry.

Mr. Willmarth: That is objected to as calling for the opinion and conclusion of the witness and invading the province of the Court and in no manner binding on this defendant. May the objection stand to the question and answer and may it also stand as to all similar testimony.

The Court: All right. The ruling will be the same.

A. It is a track built to serve industries, either owned by the railroad or the industry. In fact, in this case at hand, there was no railroad out there until the

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industry was constructed and it was built to serve that industry and that is what it does. It is an industrial track.

Q. In your experience would a local freight conductor be entitled to any extra pay if he is required while en route to switch an industrial track on his line?

A. He would not.

Q. What extra pay would he be entitled to on that run?

A. Overtime if accrued.

Q. In your experience have you handled the issuance of bulletins establishing the assignments for road crews in local freight service?

A. I have.

Q. Have any such bulletins ever stated that switching is to be performed on designated industrial track?

A. Not to my knowledge.

Q. What is the purpose of having local freight train operations?

A. The communities and the railroad try to locate industries for the upbuilding of the community and to afford revenue to the railroad and increase the population. You need a local freight train to go over the line and switch these industries and afford service to them. Otherwise, you wouldn't have the industry.

Q. Has or not that practice been going on ever since there has been railroading, so far as you know?

A. Yes, sir.

Q. Has it or not always been the general practice for local freight crews to switch industrial tracks without being paid additional compensation for that service?

A. That is right.

Q. For that service?

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917 A. Yes, sir.

Q. Does it make any difference whether the industry spur track is owned or is not owned by the railroad?

A. It does not.

Q. Will you refer briefly to some actual practical examples—

Mr. Willmarth: That is objected to—

Q. Within your own knowledge.

Mr. Willmarth: As not tending to prove custom on any other part or any other run of the railroad. It is in
918 no manner binding on this defendant.

The Court: I'll have to overrule the objection.

A. Well, there are hundreds of others, of course. Many hundreds, right here on this division. Rock Hill—I mean, York, there is a long industrial track there. Down at Bath, Langley, South Carolina, there is a very long industrial track diverging from the main line. Orangeburg, Pineville; Austell, Georgia; Aragon, Georgia; Rockmart, Georgia.

Q. And all of those—

919 A. All of those are long industrial tracks.

Q. Those are industrial tracks for which no additional pay is claimed or recognized on a local freight service?

A. That is right; and no complaints from the men.

Cross Examination

By Mr. Willmarth:

Q. Mr. Keister, do I understand your definition of an industrial track to be one that serves an industry, however long the track may be?

920 A. Industrial track serving an industry is an industrial track.

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Q. And that would be irrespective of the length, whether it was right along the line, a block or two, or whether it was off the line, four, five or six or seven miles?

A. That is true.

Q. Ten miles?

A. Just whatever it is, whatever the work requires.

Q. Or fifteen miles?

A. That is a hypothetical question and we are not dealing in that. We are dealing in facts now. Now, to govern those industrial tracks we furnish the service, whatever it may be, to take care of the work and to give the men time to do that work; if it is one crew, two crews, or a dozen crews; whatever required.

Q. And would your answer be the same, Mr. Keister, if it was 15 miles long?

A. Yes; I would say industrial track, if that is all it is.

Q. Twenty-five miles?

A. I am not going into that. You have never seen a case like that.

Q. Would your answer be the same, taking my hypothetical case of a plant 25 miles off the line?

A. If it is an industrial track, yes; wherever it is.

Q. Fifty miles?

A. Well—

Q. I am trying to find if you have drawn a line in there anywhere.

A. You can't draw a line. You have to serve any industry. You are required to do so by the Commission and it is up to us to arrange the service as is necessary.

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Q. If I understand you correctly, you pay no additional compensation whatever for running the men up that track; is that right?

A. This industry track at Pregnall?

Q. This industrial track to which we are referring.

A. We pay them overtime if it accrues on the run.

Q. But if they made the run without running up the track and accumulated that overtime you would pay it just the same, would you not?

A. Yes; if it is more than eight hours.

Q. So that if they made the run without accumulating any overtime and made this industrial switch operation also, they get no different pay, do they, than if they make the run straight through without making the switch?

A. That is true. They just switch this industrial track.

Q. And that would be true whether it was a hundred miles or 150-mile run or a 50-mile run; is that not correct?

A. They are supposed to switch all industrial tracks. They make overtime if they get it. They make additional mileage if they get it.

Q. So the run, we'll say 125-mile run, and the side trip off to this industry was four or five miles, they would get just their compensation for that 125-mile run?

A. They are not making any side trip. They are switching industrial tracks.

Q. All right. They make this switch—

A. He gets paid all time on duty. No arbitraries.

Q. I'll repeat my question, Mr. Keister. Let's take an example of an assigned run on 125 miles.

A. All right.

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Q. That man will be paid, will he not, at the mileage rate for that 125 miles?

A. Yes.

Q. How do you determine the mileage rate, Mr. Keister?

A. Well, it is based on 12 1/2 miles an hour, his time on duty is.

Q. And assuming that the basic day's pay for easy computation is \$10.00 a day, how do you determine his rate per mile?

A. It is shown in the schedule.

Q. How is it figured out?

A. Well, you multiply the mileage there by the rate.

Q. Do you not divide that \$10.00 by a hundred miles to get the mileage rate?

A. That is right.

Q. And under my hypothetical question, for easy figuring on a basic day of \$10.00 per day, the mileage rate would be ten cents a mile, would it not?

A. Yes; correct.

Q. This man making that 125-mile run would then be paid \$12.50 for the run, would he not?

A. Yes.

Q. Excluding any overtime?

A. That is right.

Q. He would be paid that under your assumption whether or not he made that trip up to that industry, would he not?

A. He is not making a trip up to an industry. He is switching an industrial track en route, part of his duty. This or any other industrial track.

Q. But he has to get up to that industry?

A. He has to get to all of them.

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Q. And you say that is not a trip, whether it is five, ten, fifteen, or fifty miles?

A. It is within his day's work.

Q. If I followed you correctly, you said that in your experience the Southern had never recognized any additional compensation for that kind of trip?

A. I said this and meant this: they have never paid any arbitrary for switching industrial track. There might be cases where they have been negotiated for some particular reason or on the merits of the case.

Q. Are you familiar with the run from Memphis to Sheffield?

A. Yes.

Q. And the four-mile offset there to the Emco plant?

A. Yes.

Q. Didn't the Southern pay an additional day to local freight crews for running up that four miles?

A. We put on a crew to run up there and he makes two or three trips a day up there for his hundred miles.

Q. Didn't you pay the crew assigned between Sheffield and Memphis a day for going up there?

A. No.

Q. Never did. And down at Blair—you are familiar with that one of course?

A. Perfectly.

Q. Where is the run at Blair? What run are the men assigned to there?

A. At Blair is the atom bomb plant, the Government. There is a track owned by the Government, mile and a half long, down to their yard. We were handling about 200 cars a day, loads and empties, over that little single track. When they started they were in a hurry for everything: tracing everything. We started to run-

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ning our locals and through crews down there, while cars at their yards set it out; mixing up with their crews. 927

Q. May I interrupt you just a minute; were claims filed?

A. I'll tell you all about it. You wait and let me answer this question.

Q. I'd like you to answer—

A. You wait until I get through with this one. We would run them down there—

Mr. Willmarth: Just a moment. I move to strike all this as unresponsive to the question. 928

The Court: I think it is responsive to it.

Mr. Willmarth: I asked him what run are they assigned to, between what terminal points.

The Witness: You didn't say terminal points. You were asking me about Blair.

Q. I ask you what run the men were assigned to.

A. That is a different question. The crews run from Knoxville or John Sevier to Oakdale and return.

Q. How long is that run?

A. Fifty-five, sixty miles in each direction. 929

Q. And Blair is an intermediate point on that run?

A. Mile Post 41.

Q. And this run involved a local freight crew, did it not?

A. And a through freight, both.

Q. And from Blair to Jones' Yard was a distance you said of a mile or so?

A. Mile and a half.

Q. And was or was not additional compensation recognized as due those men?

A. Not until after negotiation and considering other merits, and when that was done the crews and the 930

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management arrived at a rate to pay them for that service.

Q. That rate was in addition to the regular rate which they received from operating between Knoxville and Oakdale, is that correct, Mr. Keister?

A. Well, they got additional mileage, which absorbed the overtime, of course.

Mr. Willmarth: That is all.

Re-direct Examination

By Mr. Barnwell:

Q. You were interrupted in telling about the situation there. What took place? Will you just go ahead in your language and state exactly what did happen?

Mr. Willmarth: I object to his giving his reasons as to what prompted the negotiation and the agreement. It is in no manner binding on this defendant, immaterial and irrelevant, conclusion of the witness. And I ask that the objection stand to all similar testimony.

A. I don't think it is necessary for me to elaborate, Colonel; he knows it all. All my friends back there know I know it.

Mr. Barnwell: The Court wants to know it.

The Court: It is not what people know. We have to decide this case on the record. The stenographer is taking it.

On this objection, the objection will stand for all of this but it will be overruled.

Now you can go ahead and tell us everything about that Blair situation.

The Witness: At Blair is the Government plant.

The Court: Where they make the atom bomb?

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The Witness: Yes, sir. And we had a very heavy business in there, about 100 to 150 loads in and the same number of empties out daily. And we had a congestion there, single track for a mile and a half, and they were in a hurry for their freight; tracing every car. Well, we started to run the local down there. We would run through freights down there to set the cars off. Wasn't any switching. It was just an interchange with the Government railroad. And the men commenced to turn in an extra day, extra time for it. The negotiations were had and we arrived at a solution and paid accordingly; because it was dangerous down in there, meeting the Government engines and so much business going in there on a downhill grade and the company recognized that there was something due in that case.

Q. Was an agreement reached between the parties?

A. Yes, sir.

Q. And is this the agreement that was reached? Just read it.

Mr. Willmarth: You can introduce it if you like.

A. Want it read?

Q. Yes, sir.

Mr. Barnwell: We'll introduce it and read it.

(Document referred to was marked Plaintiff's Exhibit No. 16 and received in evidence.)

A. (Reading) "In disposition of the controversy relating to performance of service to and from the so-called 'Jones Storage Yard', at Blair, Tennessee, the following is agreed to:

"1. When local freight crews go to the so-called 'Jones Storage Yard' at Blair, two miles will be added to their service trip and the time at which overtime will begin will be extended accordingly.

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949 "2. When through freight crews go to the so-called 'Jones Storage Yard', they will be allowed as an arbitrary and in addition to other compensation on the trip, pay for one hour at pro-rata through freight rates. It is agreed that no additional mileage will be allowed because of going to the said 'Storage Yard' and neither will Article 15 be applicable to any service which they render in connection with their movement to or from the said 'Storage Yard'. In other words, the arbitrary payment of one hour will operate to prevent the application of Article 15 and the payment of local freight rates for services rendered in connection with going to and returning from the said 'Jones Storage Yard'. Should they perform service at other points on their day or trip which entitles them to local freight rates, Article 15 will apply, but this will not change the basis of payment for the arbitrary hour.

950 "3. The provisions of Paragraphs 1 and 2 will, in accordance with the class of service engaged in, apply to so-called Blair turns.

"4. Pending claims will be disposed of as follows:

951 "a. Local freight crews which went to 'Jones Storage Yard' will be allowed two miles, but in this settlement of the back time claims, as the amount involved is small, there shall be no extension of overtime for local freight.

"b. Through freight crews which went to 'Jones Storage Yard' will be paid for one hour at pro-rata through freight rates as an arbitrary.

952 "5. This settlement is made without admission, precedent or prejudice by or against either party and is only in settlement of this particular matter.

"The above is applicable to the employees covered by agreements with the Brotherhood of Locomotive

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Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors, and Brotherhood of Railroad Trainmen.

"This settlement is entered into at Washington, D. C. on July 28, 1945, and shall continue in effect until thirty days' written notice is given by any part to the other of the desire to terminate or change this settlement."

Signed for the Carriers by C. D. Mackay, Assistant Vice-President, Southern Railway Company; for the employees, signed by F. C. Harrison, General Chairman, Engineers; and for the firemen, signed by Acting General Chairman W. C. Owens; for the Conductors, by J. T. Lawrence, General Chairman; for the Trainmen, John F. Scott, General Chairman; dated Washington, July 28, 1945.

Q. When you were asked about making payments on certain specified runs, are or not those payments always the result of similar negotiations and special agreements?

A. Agreements, negotiations, and conditions governing, yes, sir.

Q. And with reference to this other matter that was referred to—I think it was called Emco, wasn't it—was that, the payment there made, the result of negotiations?

A. It was called the Emco plant between Sheffield and Memphis. But it is not between Sheffield and Memphis. It is between Sheffield and Chattanooga. He had it wrong. We assigned a crew to run out there and make two or three trips a day to switch that plant and haul the loads and empties out there.

Q. And the additional pay they received there is the result of negotiations and agreement?

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967 A. That is right.

(Witness excused.)

Mr. Barnwell: That is our case, your Honor. Plaintiff rests.

Mr. Horlbeck: One question on cross examination. We wanted to ask if Mr. Cox could be recalled for a further question on cross examination.

Mr. Barnwell: I'd like to know something about it.

968 Mr. Horlbeck: I think while they are in court you can call them for further cross examination.

The Court: Mr. Barnwell, they asked for one question. Let's have him up here.

JORDAN WILEY COX, recalled, testified as follows:

(A document was marked Defendant's Exhibit "F" for identification.)

(Defendant's Exhibit "F" for identification was shown Mr. Barnwell.)

969 Mr. Barnwell: We object, your Honor. This paper is nothing more than an affidavit by an officer of the National Railroad Adjustment Board in which he undertakes to make certain statements; merely an affidavit.

Mr. Willmarth: I haven't offered it in evidence yet, Mr. Barnwell.

Mr. Barnwell: We object to it altogether, your Honor. It is nothing but an affidavit. He has got a certified copy of the record. All he can ask this witness is, can he identify something. I object to it as anything to cross examine him on.

970 The Court: I am surprised that this one question is branching out all of a sudden. No question has

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yet been asked the witness. Nothing has been offered in evidence. Let's see what Mr. Willmarth's question is. I want to find out what that one question is that was going to be asked.

Cross Examination

By Mr. Willmarth:

Q. Mr. Cox, I hand you a document marked by the reporter as Defendant's Exhibit "F", reflecting that since December 9, 1935, to and including June 12, 1947, a total of 214 cases have been filed on behalf of employees with the First Division, employees of the Southern Railway Company, with the First Division of the Adjustment Board, and that out of those 214 cases, a total of 40 have been withdrawn, 171 awards have been entered, and as of June 12, 1947, three cases are pending before the First Division of the National Railway Adjustment Board. Is that correct according to your understanding of the records of the Southern Railway Company?

A. Mr. Willmarth, I haven't counted the cases now pending. As I have previously testified, I started handling non-operating matters August 1, 1946. The last time I checked up, according to my recollection, there were quite a number of cases still pending before the Board. I realize that since that time a few decisions have been made.

Q. For the purpose of showing you had no remedy here you testified under oath you had at least twenty or thirty pending, did you not?

A. I said to the best of my recollection.

Q. And that certified document—

Mr. Barnwell: I object to him referring to the Board—

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Q. Reflecting his records correctly now, you think portrays what your records show as to the cases pending before the First Division by the Southern Railway?

A. I have no way of knowing.

The Court: I'll have to overrule the objection. He said he doesn't know.

(Witness excused.)

The Court: Are there any other questions you gentlemen would like to ask?

Mr. Willmarth: I think that is all.

The Court: They have closed. That is the situation at this time. We'll meet again at three o'clock.

(Recess until three o'clock p. m.)

Afternoon Session

Mr. Willmarth: My next two witnesses are being taken somewhat out of order, your Honor, because of the necessity of their leaving town.

The Court: Surely.

JOHN F. SCOTT, a witness for the defendant, after being sworn, testified as follows:

Direct Examination

By Mr. Willmarth:

Q. State your full name, Mr. Scott, for the record.

A. John F. Scott.

Q. And where do you reside?

A. Knoxville, Tennessee.

Q. What is your occupation?

A. Chairman of the General Grievance Committee for the Brotherhood of Railroad Trainmen for the Southern Railway.

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Q. Does your organization represent trainmen employed by the Southern Railway?

A. Trainmen and yardmen, yes.

Q. How long have you occupied that position, Mr. Scott?

A. Since 1936.

Q. Will you just give us a brief review of your railroad experience?

A. I was hired by the Southern Railroad Company as an apprentice blacksmith when I was thirteen years old in Knoxville. I worked in the shops three years and then went to braking on the railroad when I was sixteen years old. I was later on appointed train conductor; later gave up the conductor's rights and retained my rights as a trainman, flagged on the passenger train, and I took this position in 1936 and I have been on it ever since.

Q. Briefly, will you state what the nature of your duties are as General Chairman of the Grievance Committee of the Brotherhood of Railroad Trainmen on the Southern Railway?

A. To negotiate agreements between the carrier and the trainmen and yardmen, to represent them in matters of agreement, and prosecute claims for time beginning with the General Manager to the personnel officer, and make submission to the National Railway Adjustment Board.

Q. Do you solicit those claims?

A. I do not.

Q. How do they come to you?

A. If the employees feel that they have had a grievance or that they have not been properly paid or have been improperly treated and they make a complaint in writing and take it to their local lodge of the Brother-

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hood of Railroad Trainmen. Ordinarily the lodge refers it to the chairman of the local Grievance Committee. And he in turn represents the employee in handling the matter with the division superintendent. If the dispute is not settled with the division superintendent and the local chairman, the grievance is ordinarily appealed to me for handling; and I immediately begin by correspondence and oftentimes personal conferences with the General Manager in an endeavor to settle the dispute. If it is not settled with the General Manager, then I appeal to the personnel officer, the assistant vice-president, Mr. C. D. Mackey, he and his staff to handle those matters with me by correspondence and in personal conferences. And if it is not settled there, then I decide whether or not it will be submitted to the National Railroad Adjustment Board for final decision.

Q. If it were a time claim, ordinarily the employee, I take it, would file his time claim which would be the first step?

A. That is right.

Q. And then if he failed to obtain an adjustment of that claim with the superintendent he would then refer it to the local chairman of his local committee?

A. The superintendent's staff will notify this employee in writing that his claim has been declined.

Q. And then your usual next step will be for him to refer his claim to his local chairman?

A. That is right.

Q. Who will then take the matter up on his behalf, if they so see fit or his local committee so sees fit to authorize it?

A. Yes.

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Q. Will you state how a run is assigned and how the man knows what job he has under an assignment under the practice and the rules prevailing on the Southern Railway System?

A. The carrier establishes a run, or prepares to establish a run. And in order that men may be assigned to that run it is published on bulletin boards where all employees can see it, telling them of this run and asking that they make applications or bids for the service before midnight of a certain day; that is of all the train operating crew, from the engineers, firemen, conductors, trainmen. And when those bids or applications are canvassed after the deadline for them to be received, the senior conductor or trainmen, as the case may be, is assigned to that run.

Q. How does that conductor, or trainman, as the case may be, know exactly what his job is under that assignment?

A. The bulletin will state the initial terminal for this run and its final terminal or a turn-around point, if it is to come back to that same terminal on one trip, depending whether it is on a straightaway or a turn-around basis. And ordinarily they know the line of road and they know ordinarily what work is to be done.

Q. Along that line?

A. Along that line.

Q. Between the two terminal points; is that correct?

A. That is right.

Q. In local freight service on an assigned run between two terminal points, and we'll refer specifically to a straightaway run as opposed to a turn-around run, what would be the nature of the duties of those employees under a bulletined straightaway run?

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981 A. Their duties would be to perform all station and industrial switching along their line and to unload and load package freight. Well, of course, the station and industrial switching would include setting off and picking up cars at way stations and—

Q. Excuse me.

A. I believe that is all.

Q. Would that switching, as you have known it in your years on the Southern, always be along the main line of the road?

982 A. Oh; yes; adjacent tracks within reasonable distances has been the practice.

Q. And those tracks ordinarily are not more than a block or two long, are they, Mr. Scott?

A. No; I'll say not more than two or three blocks. There might be isolated instance where within a town that there might be several industries or mercantile establishments where cars would be placed that probably go around a street for more than three blocks, but very, very seldom.

983 Q. Generally speaking, the industrial spur off the main line along the line would be somewhere in the neighborhood of not more than two or three blocks long?

A. That is right, as a general rule.

Q. Suppose this man on an assigned run between these two points is required to make a trip to switch an industry which requires him to run between six or seven miles. Is that referred to within your understanding of the term as used on the Southern Railway as an industrial switching operation within his assignment?

984 A. No. That is somewhat new to me. It gets into the border of side trips or turn-arounds.

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Q. That is, would a man run that way run on a straightaway run?

A. Men don't so understand that that are their duties.

Q. How do they understand a straightaway run?

A. A straightaway run is from one terminal to another and in local freight service to perform switching at stations and industries along the line within a short distance of their main line.

Q. If a man were run on beyond his assignment would you make claim for an extra day if, for instance, he was run five miles on beyond one of the terminal points?

A. The employees—in fact, if I was on the train I would, yes.

Q. And under what ground would you make that claim?

A. Because we were run out of our assignment on a turn-around basis.

Q. And have you collected in the course of your experience—

A. Several.

Q. An extra day's pay for a trip run out of the assignment such as I have described?

A. Oh, yes.

Q. And is that or is it not a generally well understood principle which has existed for long years under your schedule contracts with the Southern that if a man is run outside the assignment he is entitled to collect under Rule 5(a) an additional trip or basic day's pay?

A. That is right.

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Mr. Barnwell: You are asking this witness, as I understand, who has appeared as a trainman, to testify about the conductors' contract?

Mr. Willmarth: I am asking him to testify generally. I think you said their schedule rules are approximately the same, have you not?

Mr. Barnwell: He is referred to the conductors' contract.

The Witness: I can qualify it.

By Mr. Willmarth:

Q. Go ahead.

Mr. Barnwell: His whole testimony has been that he is head of this committee of the trainmen. We are dealing with the conductors' contract.

The Court: He said that he would like to state how he is qualified. Let's hear what his answer is.

By Mr. Willmarth:

Q. Go ahead.

A. There are quite a number of train conductors that do belong to the trainmen's organization and under the provisions of the Railway Labor Act any organization can represent an employee in another service but he will have to be governed by the contract or agreement between the organization that he belongs to and the carrier. These conductors that belong to the Trainmen, if they have complaints they will render them, send them up through the trainmen's organization to me as General Chairman as a trainman would. I represent him under the provisions of the conductors' contract and I have familiarized myself with it. And, in fact, the two contracts previously were joint and they have been separated only in the last few years and very little differences was made between the two. And I think I am qualified to testify

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as to the provision of the conductors' schedule. They are part of my duties.

Q. In other words, as you process the claims of your members who happen to be working as conductors you process those claims under the conductors' contract because the conductors' organization represents conductors on the Southern for purposes of contract; is that not correct?

A. Correct.

Q. As a matter of fact, is not one of your members presently operating on this run?

A. I cannot answer as to that at this time.

(A document was marked Defendant's Exhibit "G" for identification.)

Mr. Barnwell: I'd like to see that, if the Court please.

(Defendant's Exhibit "G" for identification was handed to Mr. Barnwell.)

Mr. Willmarth: Your Honor, we called for production of the original of Defendant's Exhibit "G". Following examination of it, I understand that this copy does conform with the original.

Q. Handing you document marked by the reporter as Defendant's Exhibit "G", I'll ask you if you can identify it.

A. Yes. This is a memorandum of agreement No. 1 that was negotiated and executed by the chairman of the four organizations, I believe it was July 30, 1945.

Q. And does this agreement provide for payment of additional compensation to crews making on their run what is known as a lapback?

A. Lapback or turn within a turn, yes.

Q. What is your understanding of the meaning of those terms?

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A. Well, a turn within a straightaway is that a train leaves a terminal and at some intermediate point it turns back, not necessarily turns its engine but it goes back—

Mr. Barnwell: Is that definition in this?

Mr. Willmarth: I am just asking him for his understanding.

Mr. Barnwell: The best definition would be the definition in the agreement he has.

The Court: Mr. Willmarth, is that in evidence?

Mr. Willmarth: No; I expect to offer it, your Honor.

The Court: You will offer it?

Mr. Willmarth: I will offer it.

The Court: That is a definition?

Mr. Willmarth: Yes; there is a definition.

Q. Will you read Question 1 attached to the memorandum?

A. "As to lapbacks referred to in this Memorandum does this term mean a lapback made on the main line over which the train is moving between terminal and terminal or terminal and turning point or returning from turning point to terminal?" The answer is "Yes".

Q. Prior to the execution of this agreement, Mr. Scott, had there been claims filed from time to time by the men for additional pay where they had been required to make lapbacks?

A. Numerous claims, which had been in dispute and had been decided by the National Railroad Adjustment Board, Division One, on several occasions.

Q. Had that Division rendered awards in favor of the men?

A. For additional pay for 100 miles. We felt like that we would like to make an adjustment as to these

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matters and probably agree for the men to be paid approximately what their services were worth, but you couldn't get a negotiation, we couldn't get a negotiation on those matters until the awards were rendered awarding us 100 miles; and then we made this agreement as to reduced compensation for making such trips, which eliminated most of it. 1001

Q. Prior to the execution of this agreement, on what ground were those claims filed, Mr. Scott?

A. That these runs were assigned to make a straight-away trip; that is, from terminal to terminal, and men expect to make those trips without interruption. If they were turnaround trips they expected to go to their turning point and return to their terminal without this unusual or unreasonable interruption. 1002

Q. So that prior to this memorandum a man required to make a lapback trip would file a claim, and would not that claim be filed on the ground that he had been run contrary to his assignment?

A. That is really true. There is one rule, a general rule, that will let you make short turnaround trips in Article 8(b) of the conductors' schedule but it defines how they will be made and who will be allowed to make them. 1003

Q. Will you refer to—

A. I have a schedule.

Q. Perhaps we better refer to the one that is in evidence. I believe it is identified as Plaintiff's Exhibit 12. Will you read the rule in Plaintiff's Exhibit 12 to which you have reference, Mr. Scott? 1004

A. Article 8, subsection (b), on page 9 of the current schedule between the conductors and the carrier. I quote: "Conductors in pool or irregular freight service may be called to make short trips and turn-

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1006 arounds with the understanding that one or more turn-around trips may be started out of the same terminal and paid actual miles, with a minimum of 100 miles for a day, provided:

"(1) That the mileage of all the trips does not exceed 100 miles."

Q. And certain other provisions?

A. And certain other provisions in there.

Q. But that did not cover the situation, did it, of a crew, let's say on local or through freight service, being required to make a lapback?

1008 A. It wouldn't, no; no, not from an intermediate point. If you make a turn it has to be out of the same terminal, and it excludes local freight even from this provision. It says pool of men, and irregular and pool freight service. Local freight is not pool freight nor irregular service. It is an assigned service.

Q. Those claims filed prior to this agreement were made, were they not, under Rule 5(a) of the schedule?

A. Yes.

1007 Q. And from time to time the carrier has paid claims under that rule for such operation described, is that not correct?

A. Yes.

Q. Have you had occasion to represent some of your members in respect to claims for side trip operations against the Southern?

A. Yes.

Q. Can you refer to any specific instance?

1008 A. We have on the Knoxville Division, I don't think it is a written memorandum, but we have an understanding whereby that crews running through Bulls Gap, an intermediate station between Bristol and John Sevier, go one mile into the yard, one mile one way,

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two miles round trip, to pick up cars and when they are thus required to do that they are paid two additional miles for that service. 1909

Q. And is that two additional miles over and above the pay they would receive for the regular service trip between their assigned terminal points?

A. That is correct. And it was settled because men made claims for an additional hundred miles for that service, which is the minimum claim as we understand it.

Q. (A document was marked Defendant's Exhibit "H" for identification.) 1910

Q. I am handing you defendant's Exhibit "H". Does that diagram, without of course being drawn to scale, correctly depict the run and the side trip operation into Bulls Gap?

A. Well, it doesn't give all those tracks. There is a Y there and a straight track—

Q. Where is the Y? Will you mark on it where the other tracks are to which you refer?

A. Mark on this one?

Q. Yes; mark right on it. 1911

A. There is another track leading from this Bulls Gap yard up here to Asheville, North Carolina, that comes in and comes under this Bristol main line down here. The Appalachia Division crew terminate up here in this yard. These tracks have always been used by engines and trains that necessarily move down in here to these coal shutes down in here and water tanks and it is not a main line movement.

Q. These men who were making these claims were on what run?

A. They are on run between John Sevier and Bristol. 1912

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1012 Q. And they were being required on their run between John Sevier and Bristol to run up into Bulls Gap?

A. Stop here and go a hill up here to these yards, pick up cars and bring them back and put them in the train and then go on their trip to John Sevier or vice versa.

Q. That is a mile off of their assigned run to Bulls Gap yard; is that correct?

A. Yes.

Q. And then back on their run?

1014 A. That is right.

Q. Were claims paid for that trip?

A. Well, I don't know that any hundred-mile claims were paid but it resulted in negotiation to where that they would receive pay for two miles.

Q. You agreed with the carrier for additional compensation over and above what they received?

A. That is right.

1016 Mr. Willmarth: The defendant offers in evidence Exhibit "H" for the purpose of reference in the light of his testimony, depicting not exactly the situation but to clarify his testimony, your Honor.

(Document marked Defendant's Exhibit "H" for identification was received in evidence.)

Q. You said there had been other situations, Mr. Scott. You wish to refer to another one?

1018 A. Well, there was a local freight crew assigned to run on straightaway basis, Bulls Gap to Asheville. They moved from the Bulls Gap yard over this line that I mentioned a few minutes ago that went under the Bristol—John Sevier line, and intercepted another main line running from Knoxville via New Line—Morristown to Asheville. This intercepted this line at

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Leadvale. Upon an occasion this local crew moving on its westbound trip from Asheville to Bulls Gap was interrupted at Leadvale and diverted from its regular route of its regular assignment and routed over the Asheville line to New Line where it intercepted the Bristol—John Sevier main line and run over that line to Bulls Gap for the purpose of moving cars or doing some switching or possibly serving some industries around Morristown; I don't know exactly what, but claim was made for 100 miles and after long-continued negotiations it was paid. Later the same thing happened to a through freight crew, running from Asheville to Bulls Gap, and it was diverted at Leadvale and run around by New Line and Morristown into Bulls Gap. And after continued negotiation, probably submitted to the Board and withdrawn—I can't remember those things definitely—the carrier paid that claim of 100 miles.

Q. I'm not positive that I followed the particular run you were referring to, Mr. Scott. Is that depicted or is that with reference to another run?

(Document handed to witness.)

A. This doesn't depict that at all.

Q. Do you recall claims on this run?

A. I know of such claims but they are not well enough in my memory to detail them.

Q. Do you have pending against the Southern Railway on behalf of some of your members side trip claims with reference to an assigned run between Lake City and Briceville?

A. Several.

Q. Will you give the terminals and the stations involved? I don't have them.

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1021 A. A local freight is assigned to operate on straight-away basis between John Sevier, Tennessee—that is the Knoxville terminals—to Jellico, Tennessee, Kentucky—that city is on the line. At Lake City, an intermediate point, is a mine run assigned and it works up a creek to Briceville, six or seven miles, performing mine service and local freight service. On occasions that this run has been discontinued for a day or for an undeterminable time, this local freight crew has been required to leave their main line and go to Briceville to perform the service that this mine run would
1022 perform had they been on duty.

Q. How far is that trip?

A. It is six or seven miles. I am not exactly familiar with the distance. It may be a little more.

Q. That is, they leave an intermediate point on their main line and make a trip off up to Briceville six or seven miles?

A. That is right.

Q. For switching purposes, I take it?

A. And local freight service.

1023 Q. And you have claims presently pending. Is that a branch line?

A. Well, I don't think so. They don't run any regular trains over it. They use it as a switching track. It is, I guess, an industrial track because it is serving those mines. I don't know whether there is any manufacturing industries in there or not.

Q. Those claims are presently pending for adjustment before the Southern Railway officials; is that correct?

A. That is correct, sir.

1024 Q. Under what rule of the schedule are you processing those claims?

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A. That this crew was run out of their assignment, taking a side trip. 1022

Q. Handing you Plaintiff's Exhibit 16, are you familiar with that exhibit, Mr. Scott?

A. Yes.

Q. Prior to the time that memorandum was entered into had the organizations filed claims for the side trip involved in that?

A. The employees had filed the claims and the organizations were processing them for 100 miles for each trip made, which resulted in negotiations.

(A document was marked Defendant's Exhibit "1" for identification.) 1023

Q. Handing you Defendant's Exhibit "1", does that represent the run between Oakdale and Knoxville off which these crews were being run?

A. Yes, that is the geographical situation there. There are some additional storage tracks in here and of course the tracks are curved more or less. There is a Y in there. But that gives a general idea of the way it runs.

Q. In other words, the crew was run from Oakdale to Knoxville and under their assigned bulletin; is that correct? 1024

A. They were run—the through freights—they were run on a turnaround basis from Knoxville to Oakdale and return.

Q. And the local freight?

A. Sometimes they are assigned on a straightaway basis between Knoxville and Oakdale and sometimes they are assigned on a turnaround basis but they go through this intermediate point of Blair and were required to make this trip, a mile and a half approximately to the Jones Yard. 1025

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1029 Mr. Willmarth: Defendant offers in evidence Defendant's Exhibit "I".

(Document heretofore marked Defendant's Exhibit "I" for identification was received in evidence.)

Q. Mr. Scott, in your experience on the Southern Railway have you ever known of any custom or situation or understanding by which men on an assigned local freight run, straightaway, were required to make a side trip operation six or seven miles or more than a mile by which it was understood and recognized that that was part of their assigned service trip?

1030 A. They have not so considered it that way.

Q. I take it, your men sometimes do not file claims for violations of the schedule rules?

A. That is correct.

Q. You do not solicit those claims, I understand?

A. No.

Q. The men themselves operating these runs don't always know their rights under the schedule, isn't that correct, Mr. Scott?

A. Absolutely so; yes.

1031 Q. They may in some particular division make trips not knowing that it is a violation of the schedule rule?

A. That is right.

Q. But when it has come to your attention by claims being referred to you, have you as General Chairman ever conceded to any principle by which men ran off their regular assignment for a side trip to some switching or industrial plant more than a mile off the main line, have you ever conceded to that situation being contemplated as within their regular service trip?

1032 A. I have not. It is my responsibility to determine as nearly as I can as to whether or not their assignment has been broken—that is, if their work has ex-

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ceeded the assignment, the work to which they had been assigned. I might have refused to handle some claims because the work done wasn't a sufficient distance or for some other reason that their assignment—that they weren't run out of their assigned duties, or so every small until it was not noticeable.

Q. Isn't it your purpose as General Chairman to make sure if possible that the carrier follows the schedule rules without violation?

A. That is right.

Q. Is it your purpose as General Chairman particularly to collect extra day's pay for men?

A. It is my duty, yes. My purpose—

Q. Not your duty, but is it your purpose particularly to look for a situation where you can collect an extra day's pay?

A. It is not. I have always looked within reason to a just compensation and have loaned my thoughts and purposes and intents to not collecting more than the services is worth. If I can get the carrier to negotiate with me, but oftentimes we have to make the full claims in order to get them to negotiate with you and make an agreement whereby you'll be paid compensation that is just and reasonable.

Q. In the absence of an agreement, is it not true that Rule 5(a) covers any trip made off the assignment?

A. That is right.

Q. Be it however small?

A. That is right.

Q. You had made claims as to lapbacks, had you not, prior to this memorandum of understanding?

A. That is right.

Q. And that situation extended over some years, had it not?

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A. Yes.

1027

Q. And from time to time the carrier had paid an extra day for a lapback, had it not?

A. They paid only those that the National Railroad Adjustment Board, Division One, decreed they should pay, as to the best of my knowledge.

Q. The others they refused and said it was part of a man's job; is that right?

A. That is right. Until the memorandum, and then the outstanding claims were paid in accordance with the provisions of the memorandum.

1028

Q. The memorandum represented an agreement between you and the carrier as to what was fair for the additional service referred to in subparagraph (c) of page 1 of the memorandum; isn't that correct?

A. That is right.

Q. Have you and the other General Chairmen in concert made an attempt to reach with the officials of the Southern Railway some similar fair understanding with reference to side trip claims off the Southern?

A. Yes.

1029

Q. Will you relate just what your experience has been in that connection, Mr. Scott?

A. I have talked to Mr. Travis, who is the personnel officer, about these matters several times; possibly with Mr. Cox, I don't remember for sure. We have never reached any conclusion; Mr. Travis-taking the position that such claims were just made because freight crews were required to go out and switch industries, and we would differ in the interpretation of the schedule and never reached a conclusion. The General Chairman of the Conductors endeavored to make arrangements to negotiate an agreement in my presence with Mr. Travis.

1030

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Q. That effort was unsuccessful, to date? 1041

A. It hasn't been yet consummated and I don't believe it is in any kind of process of being done. That would, of course, settle these claims.

Mr. Willmarth: That is all.

Cross Examination

By Mr. Barnwell:

Q. Mr. Scott, referring to your testimony about this Knoxville Division, Bulls Gap—I think it is Exhibit “H”. (Exhibit handed to witness.) That is the one where I understand after negotiations you agreed on an additional two miles to be paid for; is that right? 1042

A. It was agreed. I know that they have been paid. As to a written memorandum, I never saw one.

Q. But I mean there was a definite understanding under which they were given an extra two miles' pay; is that right?

A. And the practice grew up under that understanding.

Q. What did that track spring from? 1043

A. It sprung from the Bristol—John Sevier main line in two places; one just east of the passenger station or freight depot and one west and it formed a Y. And there was also a straight track that ran between the main line and the building, the station house. The two Ys—the two tracks came together forming a Y up at the lower end of the Bulls Gap yards and trains and engines use either leg of that Y in going to get water, but there's no trains operate over it except possibly there leaves from the east end of one of those tracks a train that runs to Rodgersville, a little short run; mixed run, I believe. 1044

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1046 Q. Then you say it springs from Bulls Gap and goes to what?

A. Rodgersville. You mean the little passenger train?

Q. No. This track that you are speaking of.

A. Goes to Bulls Gap yards and the tracks out of Bulls Gap yards lead to Appalachia, Virginia.

Q. In other words, that track that you speak of starts from Bulls Gap, goes I think you said to Jones Yard?

1046 A. That is the Blair situation. The Jones Yard involves the Blair situation.

Q. This goes to Rodgersville?

1047 A. Rodgersville is just a little town or city in Hawkins County and there is a little run runs up there. It is one branch running up there, and of course the Bulls Gap, the Appalachia Division line extends on from the yard on up. Those trains don't come down into the Bull Gap station. They stop up in the yard and the only train that I know of that comes to the Bulls Gap station is this little short turnaround mixed run between Bulls Gap and Rodgersville.

Q. And that is a run, isn't it? That is a regular established run?

A. Oh, yes.

Q. That is not an industrial switch, in any sense of the word?

A. I didn't understand.

Q. I say that is not an industrial switching track in any sense of the word?

A. Oh, no; not an industrial switching track. Those tracks down there are used for station switching.

1048 Q. I mean this two miles—mile each way—that is not any industrial switch?

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A. Oh, no. That is used solely for these trains to go into the Bulls Gap yards and get additional tonnage to be moved in their trains. 1040

Q. You also testified, I believe, about local freight run from Bulls Gap Yards to Asheville?

A. Yes.

Q. And then that, you say, was interrupted at Leadvale?

A. Leadvale.

Q. And then what happened?

A. It was diverted from its regular course on the tracks through the cut-off, so-called cut-off, to Bulls Gap and run around over the Asheville tracks to New Line where the Asheville tracks intercept the Bristol-John Sevier tracks and then was run up the Bristol-John Sevier tracks to Bulls Gap. 1041

Q. Was that interruption and turning off on that intersection where this question arose, is that right?

A. It was a side trip, yes, sir.

Q. But that, again, was in no sense an industrial switching track, was it? 1042

A. There was a lot of industrial switching tracks adjacent to those main lines.

Q. I am talking about—

A. I don't know whether this train done it or not.

Q. I mean the industrial switching didn't come into that controversy?

A. It is not an exclusive industrial switching track. It is a main line track over which passenger and freight trains run.

Q. On your Lake City and Briceville, I think you said? 1043

A. Briceville, yes; B-r-i-c-e.

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JOHN F. SCOTT

1052 Q. You said at Lake City there was a mine run to Briceville?

A. Ordinarily, yes.

Q. And that was the run that was involved, going from Lake City to Briceville; is that right?

1054 A. It was involved only in the manner, in the way that it was discontinued for a day or for an indeterminate time, for several days. But it is not the crew that made the claim. The crew that made the claims was the crew that was required to go to Briceville on a side trip at Lake City, an intermediate point on their straightaway run.

Q. That trip to Briceville, what sort of a track was that? Was that a main, branch, or what? The line from Leadvale to Briceville.

A. It is not a main track. It is a mine track or industrial. If a mine is an industry, it is a mine track or industrial.

Q. But it goes to Briceville?

1055 A. Goes up in that area around Briceville. Briceville is up in that direction. I don't know whether it serves the city; probably.

Q. It probably does serve Briceville?

A. It probably has some local.

Q. But in a sense it would serve the public. That question was not involved in your dispute, was it?

A. I don't know.

Q. I say it was not involved; the question was that they were making this run outside of their regular assignment to Briceville; is that right?

1056 A. If they hadn't gone all the way to Briceville it would have been a side run. They went up and served those mines.

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Q. They did go to Briceville, which is a station, is a community? 1007

A. I don't know whether they went to the community or not. I don't know whether there was really a building at Briceville or not. I know the tracks and layout and the general rules governing but I have never been there.

Q. And you don't know how much the public at Briceville was served or whether there was any public or anything?.

A. Except by hearsay. 1008

Q. And so far as you know, the public in Briceville were served?

A. I don't know either way.

Q. I think your next example was the run between Oakdale and Knoxville, was that it?

A. At the Blair interruption, yes.

Q. That is exactly the same trip that—you have been here and you heard Mr. Keister testify, didn't you?

A. Yes.

Q. You heard him testify about that whole controversy? 1009

A. That is right.

Q. His statement as to what took place was accurate, wasn't it?

A. Substantially correct, yes.

Q. And this run from Blair which you said was to Jones Yard—you corrected me, I think; that was the one to Jones Yard?

A. Yes. That is the one that went down to Jones Yard. 1010

Q. I understood you to testify on direct examination that an industrial spur was seldom more than one or

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JOHN F. SCOTT

1061 two blocks, although if it was in a city it might run around four or five; is that correct?

A. It is my experience and information, yes.

Q. Are you familiar with the spur track at Bath, South Carolina?

A. No; I am not, sir.

Q. You are not familiar with that?

A. No.

Q. You don't know that that is nearly two miles long—you are not familiar with it?

1062 A. Don't know a thing about it. About the only physical knowledge I have of tracks is the Knoxville Division where I worked as a trainman and conductor.

Q. That only takes in what?

A. The Knoxville Division. That is from Bristol to Chattanooga and Asheville, Jellico and Oakdale, Maryville. These other things don't come to my notice unless there is some disturbance about them and it makes it necessary for me to have to make an investigation.

Q. So that your testimony as to the length of spurs is limited entirely to that portion of the railroad?

1063 A. As to my actual knowledge as knowing and seeing. But to other places from claims or disturbances that might come up which compel me to investigate the matters, which is not very many.

Q. You couldn't say there may not be many spur tracks a mile or more long?

A. There might be many, yes.

Re-direct Examination

By Mr. Willmarth:

1064 Q. Mr. Scott, do you know of any distinction under conductors' rules or the trainmen's rules between a side trip on a branch line, so to speak, and a side trip

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off six or seven miles to an industry, as between side trips? 1086

A. I don't know that I understand your question, Mr. Willmarth. If a crew makes an unusual length out on a spur track that is unreasonable, we get a claim about it ordinarily. That is the first we know about it. Our rules, as I interpret them and understand them, that when you get into a mile track off your main line you are getting unreasonable and men should have additional compensation for those things. That is my interpretation of the rule. 1086

Q. You are going outside of an assigned straightaway run?

A. That is right.

Mr. Willmarth: That is all.

(Witness excused.)

F. C. HARRISON, a witness for the defendant, after being sworn, testified as follows:

Direct Examination 1087

By Mr. Willmarth:

Q. Will you state your full name, Mr. Harrison?

A. F. C. Harrison.

Q. Where do you reside, Mr. Harrison?

A. You'll have to talk just a little bit louder. I don't hear so good.

Q. Where do you reside?

A. Knoxville, Tennessee.

Q. What is your occupation?

A. I am General Chairman of the General Committee of Adjustment, Brotherhood of Locomotive Engineers, Southern Railway System. 1088

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F. C. HARRISON

1069 Q. Your organization, then, represents engineers employed by the Southern Railway?

A. Yes, sir.

Q. How long have you been employed in that position, Mr. Harrison?

A. I have been General Chairman four years; local chairman four years previous to that. I was employed as fireman in 1905; promoted to engineer, 1918. Run off and on up until the present time, when I was promoted to General Chairman.

1070 Q. That is, you ran as an engineer, I take it, until the past four years then, in actual operation?

A. Run as an engineer? No; I was engineer longer than that. I was promoted in 1918. I have, all told, about twelve years' experience as an engineer.

Q. Actual running?

A. Yes, sir.

Q. As General Chairman of the Engineers, do you solicit claims for your men to file on their behalf against the railway?

1071 A. Solicit claims?

Q. Yes.

A. No, sir.

Q. Do you ever go down and see if you can dig up claims to file?

A. No, sir. It is my duty to advise them, though, if they think they have a claim, to advise them in regard to it.

Q. But as a general practice are not those claims filed by the men?

A. Yes, sir.

1072 Q. And come to your attention for the first time by reference through your organizational officers?

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A. Under the rules, if a man thinks he has a grievance he will handle it in his local division. Then they refer to the local chairman for handling with the superintendent. And after he completes his handling with the superintendent and can't get a satisfactory adjustment, he refers it to me and I handle with the General Manager. And if we can't adjust it, I handle it again with the personnel officer, who is designated by the railroad company. That is the highest ranking officer I deal with. 1072

Q. When that man comes in with his claim or his grievance before his local committee, would his local committee have the power, if they so desired, to decline handling it for him? 1074

A. They have a right to decline it, the local committee, yes. Then he will refer it to the lodge. The local committee can handle a claim if in his opinion it is a schedule violation without referring it to the division for their action.

Q. But if they were of the opinion that it wasn't a schedule violation? 1076

A. They can then refer it to me, appeal from the decision given to him by the Division of the engineers or the local chairman. 1078

Q. And if you decided that it wasn't a schedule violation and shouldn't be prosecuted, what would be that man's right?

A. He refers that to the general committee in their next session.

Q. And suppose they turned him down?

A. Well, they can, if he so desires a referendum, refer it to the members of the D. A. L. E. on the Southern System. 1080

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F. C. HARRISON

1077 Mr. Barnwell: Your Honor, this is very interesting but I don't see what bearing it has on this case. This is entirely an intra method in handling claims among themselves. There is no question, no suggestion that any solicitation was made of these claims, or anything of that sort. I don't see that we are interested in all this testimony as to how they are handled. It is interesting. I think it clutters the record.

The Court: That all of it?

Mr. Willmarth: We'll go to another point.

1078 The Court: Let's go to another point.

By Mr. Willmarth:

Q. Mr. Harrison, will you give us your understanding of what a man is required to do, being assigned to a straightaway run in local freight service?

A. Why, he would do industrial switching on line road and unload freight or do most anything; unload company material on line of road, and all switching pertaining to the trip.

Q. He would do all switching along the line?

A. That is right.

1079 Q. Whether it was industrial?

A. That is right.

Q. And it would be generally known as station switching, would it not?

A. That is right.

Q. And except for certain instances where it has to be outside the town, these industries are located right along the line, are they not?

A. Yes. Well, they might be some mile away, half a mile, or something like that.

1080 Q. That is outside of town?

A. Yes.

Q. But not off the line ordinarily?

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A. That is right.

Q. He is doing switching as he goes along local freight service, along that line to which he has been assigned; isn't that correct?

A. That is right.

Q. To your knowledge has your organization or any of the others ever had any agreement generally with the Southern Railway to the effect that a man could be run off six miles or ten miles to an industry?

Mr. Barnwell: I object if he is going into the question of the conductors. I don't know that this witness is qualified.

Mr. Willmarth: I asked him about conductors or his organization also.

Mr. Barnwell: This is the officer of the engineers. He is now getting into the conductors' contract, as I understand.

The Court: He asked him if his organization had any agreement with the railway.

Mr. Barnwell: Of course, if that testimony is relevant I won't object. I don't see the relevancy of it. I understood Mr. Willmarth to be referring to the conductors' contract. I don't think this witness would be qualified to testify as to the conductors' contract, unless he qualifies.

The Court: Let's let him answer the question as to his own organization. Any such agreement with your organization?

The Witness: We have two agreements that have been negotiated since I have been General Chairman with respect to going off of the main line. One was at Blair and the other one, if I recall the place, Altavista, Virginia.

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1085 By Mr. Willmarth:

Q. I didn't understand you quite.

A. I say we have two memorandum agreements signed with the management with respect to side trips and that is at Blair and one, if I recall the name, is Altavista, Virginia.

The Court: That is, engineers?

The Witness: Engineers. And it was negotiated; the conductors signed the same one.

By Mr. Willmarth:

1086 Q. All four organizations?

A. The four organizations, yes.

Q. Did you file or did your men file time claims for the side trip operation at Blair?

A. Yes, sir.

Q. Were those time claims turned down by the Southern Railway?

1087 A. They were turned down and handled. We settled all pending claims by signing a memorandum; two miles for local freight crews for going to and from Blair, two miles down there and back; and through freight crews get an arbitrary hour.

Q. I am handing you Plaintiff's Exhibit No. 16. Is that the memorandum which you signed in conjunction with the other organizations?

A. Yes, sir.

Q. Prior to execution of that memorandum, the Southern Railway had declined to pay those time claims?

1088 A. They haven't declined to pay any of those claims after the memorandum was signed, nor settlement of the pending claims; but they declined to pay the claim for a hundred miles.

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Q. On this run from Charleston to Branchville, on which there is a side trip operation to the plants above Harleyville and which leaves the main line at Pregnall and goes a distance off the main line, 6 and three-quarters miles, would that trip off the main line from Pregnall up to the plants in your opinion be a separate and distinct trip, apart from their regular service trip bulletined and assigned between Charleston and Branchville? 1000

Mr. Barnwell: I object. I don't think this witness is qualified to testify as an expert on that question. 1000

The Court: I think I'll let him answer it. The weight of the testimony, of course, is a different matter.

A. I would consider it so, yes.

Q. You would consider it a part of the trip?

A. A separate and distinct trip you asked me.

Q. I wasn't positive as to your answer. And being a separate and distinct trip, then, in the absence of some specific agreement covering it, would it not be compensable under the Rule 5(a) of the schedule relating to the basic day pay? 1001

A. I would consider it so, yes.

Q. Your rules as to pay are substantially similar, are they not?

A. Yes, sir.

Q. To the conductors rules as to pay?

A. Yes, sir.

Q. All of these pay rules, have they not been in effect on Southern Railway for over a quarter of a century?

A. I don't know about that. Our rules have been since '29 or '39. I don't know how long they have been in effect. 1002

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1093

Q. If a man were run on beyond his terminal five miles, or on beyond Branchville in this situation five miles, would you or wouldn't you consider that a trip outside of his assignment?

A. If he went beyond his final terminal, yes.

Q. Or prior to your lapback memorandum agreement, if he were running under his assignment from Charleston to Branchville and at Pregnall they ran him back a distance on the main line five miles, would you have considered that outside of his assignment?

1094

A. Yes, sir.

Q. You would have made a claim?

A. Under the condition stipulated in that agreement, yes.

Q. Prior to that agreement would you have considered it a lapback?

A. What was that question?

Q. Prior to the lapback memorandum agreement would you have considered it?

1095

A. It states in there something not in connection with a straightaway run, if he makes a lapback. If he does that, yes, I would consider it. We did file numbers of claims for lapback before the memorandum was written.

Q. Did this lapback memorandum agreement specifically state that it did not cover side trip operations? I am referring to Questions 2 and 3.

A. Yes. Side trips not covered.

Q. Will you read Questions 2 and 3 attached to Memorandum?

1096

A. You mean that question right here, Question 2?

Q. Yes.

A. I'll read the whole memorandum.

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Q. No; don't do that. I am referring to claims, Exhibit "G", being in the memorandum executed by the four organizations with reference to settlement of lapback disputes. Will you read Question and Answer 2 and 3, which is also a part of that memorandum agreement?

A. "Question 1: As to lapbacks referred to in this Memorandum does this term mean a lapback made on the main line over which the train is moving between terminal and terminal or terminal and turning point or returning from turning point to terminal?"

"Answer: Yes."

"Question 2: Man enroute John Sevier to Asheville arrives New Line is directed to go to Morristown and get a car and return to New Line because he is not going to Morristown."

"Answer: This being a side trip it is not covered by the Memorandum." Is that all you want?

Q. And "3".

A. "Man operating between Oakdale and Knoxville arrives at Clinton, Tennessee, is directed to go to Lake City and return to Clinton, Tennessee, 20 miles, and to destination."

"Answer: Same as Question 2."

Q. That is far enough. Have you participated in any discussions with officials of the Southern Railway in an attempt to reach a settlement with reference to side trip claims similar to the settlement that was reached with reference to lapback claims under memorandum, Defendant's Exhibit "G"?

A. I was in a discussion, I think another question and that question was brought up. Mr. Travis made the remark that he would try to reach an agreement with us for side trips of over three miles. The chair-

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1101 man present told him that they would take it up and answer him. And I told him that I would have to refer it to my committee. He made a remark to me that it looked like I was big enough to answer for the committee, and I told him that I was and declined to write the memorandum for three miles.

Q. That is, you declined to enter into any agreement without consulting?

A. And it was mentioned, as I understand there, it was mentioned that he offered mileage for going down there for the Pregnall trip, if I recall right.

1102 Q. That is that mileage was?

A. Mileage would be added to, and make the trip whatever it was, possibly 112 miles and a half, overtime and after and including that 112 1/2.

Q. Do you recall anything further concerning that?

A. I further took the position that that wouldn't be as good as what we have because it took an hour and a half or two hours, knocked back, and he was on overtime all the time and that would pay him more than the miles as offered.

1103 Q. That is, if they were paid only miles added to the 63 miles, it wouldn't pay them very much?

A. No; we would lose money by it.

Q. What?

A. We would lose by it.

Q. But I take it, as a representative of your organization you are always open and make an effort to reach some fair settlement?

A. That is right.

Q. With reference to all of these side trip claims?

1104 A. That is right.

Q. And that has been true, has it no, with reference to any claims which your organization has?

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A. That is true. Has always been, of course, my policy to get a little bit more out of them than they want to give. 1105

The Court: He swore to tell the truth.

The Witness: Everybody does that, you know.

Cross Examination

By Mr. Barnwell:

Q. Mr. Harrison, where have you served as an engineer?

A. Knoxville Division, Southern Railway.

Q. And your knowledge about these matters of length of tracks and everything is based on Knoxville Division? 1106

A. The operations point as engineer, yes, confined to Knoxville Division, Southern Railway. But I have gained quite a good deal of knowledge from being the chairman of handling grievances.

Q. Are you at all familiar yourself with the situation over here at Pregnall, personally?

A. No, sir; I am not.

Q. You were asked to express an opinion with reference to a side trip. What is your understanding of a side trip? 1107

A. That is making a trip—if you are making a straightaway trip from one terminal to another and you have to stop while you are making that trip and go way back out here and make a trip down there for the purpose of picking up cars or something like that, that would be a side trip. Or if it is off the regular route.

Q. In this memorandum that you just read, the question was: "Man enroute John Sevier to Asheville arrives New Line is directed to go to Morristown and 1108

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1199 get a car and return to New Line because he is not going to Morristown." And the answer is "This being a side trip it is not covered by the Memorandum." Do you understand that?

A. Yes, sir.

Q. That is your understanding of what a side trip is?

A. Why, in that particular one, yes. There is more than one side trip, you know.

Q. What about this? "Man operating between Oakdale and Knoxville arrives at Clinton, is directed to
1200 go to Lake City and return to Clinton, 20 miles, and go to destination." That is another example?

A. That is a side trip, yes, sir.

Q. That is what you understand?

A. I understand those two that way, yes, sir.

Q. What other?

A. I would consider this Pregnall.

Q. You just testified you knew nothing about Pregnall?

A. You asked me what I would consider something
1201 else a side trip and I am just telling you.

Q. You just said you don't know anything about Pregnall.

A. You asked while ago did I. I have got enough smattering knowledge of the thing to know about that much.

Q. Isn't a side trip, according to these definitions, going from New Line, an intermediate station, to go to Morristown—that is a station, isn't it?

A. Yes, sir.

1202 Q. "Get a car and return to New Line because he is not going to Morristown."

A. That is right.

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Q. That is a line running to a station, isn't it? 1113

A. Running towards Asheville, yes, sir.

Q. Runs to Morristown?

A. Yes.

Q. Line runs to a station?

A. That is right.

Q. Take the second one. "Man operating between Oakdale and Knoxville arrives at Clinton." That is an intermediate point, isn't it?

A. Yes, sir.

Q. Is directed to go to Lake City and return to Clinton, 20 miles, and go to destination. Lake City is a station on the road, isn't it? 1114

A. That is right.

Q. Isn't it a fact that a side trip necessarily involves going to something which is of a public nature?

A. I don't think so; no.

Q. Can you give me any illustration of a side trip which merely means going to an industrial track and coming back?

A. At Lake City, there is a mine run assigned to Lake City. And it works mines up there at Briceville and several mines— 1115

Q. It goes to Briceville, isn't that right?

A. That is the end of the road.

Q. Absolutely.

A. Wait a minute. Let me tell you this. There are several mines out there. Briceville is not the only one. It is industrial switching and mine switching. This particular case the man had to go up there, if I recall it, to take some machinery up there while the mine was shut down during the coal strike and they wanted to fix it up. He took a trip up there where this mine was cut off. I consider that a side trip. This run goes 1116

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1117 up there in the mountains and stops. It don't connect with nothing nowhere.

Q. It goes to Briceville?

A. It goes to Briceville and three or four little stations up there, not particularly Briceville.

Q. Is that the same case that Mr. Scott told of?

A. I have the same case for engineers, yes, sir.

Q. And he said he didn't know whether it served the public there in Briceville or not. Do you know any more about it than he did?

1118 A. It don't either. There is no passenger run up there to serve the public, if you mean that by it, but they could bring out household goods and things like that. You know that case you asked me—the Morristown? You know, that that railroad goes on to a road junction and connects with the New Line where a freight train goes through by New Line? Do you know that going over to Morristown, just keep on going on two miles and you come into this same track over there at New Line? Our same railroad. Our passengers' trains go that way. Instead of going to New Line they 1119 go via Morristown, which is two miles to Morristown and two miles to New Junction; approximately four miles.

Q. And that is really a line running to Morristown?

A. It goes all the way around there. You can run a freight train. I have been around there many a time. It don't do that now any more that I have heard of in a long time.

Q. You mentioned two cases; one you referred to as the Blair case. Is that the same—you heard Mr. 1120 Keister tell us about that?

A. Yes.

Q. He gave a pretty good clear statement!

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A. But he said one thing about they were in a hurry at the Emco plant. When this negotiation was made for this, we didn't know what they were building out there; whether they were making atomic bombs or not. All we knew, the Government was very busy out there and they wouldn't tell nobody nothing. You heard when it went off out there. That is the first we knew of it; living right there in the back door of it. 1121

Q. You referred to another case of Altavista?

A. Yes, sir. I'm from memory now—I think that is a place but I do know this—you want me to tell about it? 1122

Q. I wish you would.

A. They were going to build a gypsum plant. I don't know what that is. But they were going to build one on the Virginia Railroad. We were called to Washington—I say we—the General Chairman of the transportation organization, with respect to writing a memorandum if the Virginia Railroad had given Southern Railway trackage rights to this Gypsum plant. The Gypsum plants had to show on their tariff, they had to show that they were served by two railroads. The Virginia Railroad said the "Southern Railway men can't operate over our track but we'll let you have the trackage rights but you can't operate over our rights." And we were agreeable to that, of course. We are agreeable to anything to try to bring these industries South, especially on the Southern Railway. We were agreeable to it provided that we didn't have to go up there. We didn't have to go up there at all. Now, interchange track with the Virginia track was about a mile or mile and a half approximately, longer than that, and we gave it, turned back over to the Virginia crews the right to have to handle our 1123

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1125 cars up there, which belonged to us under all the rules and regulations. The company agreed if we had to go up there, if in emergency we had to go up there, that they would pay us a hundred miles. We had that agreement negotiated about a year ago.

Q. That was an agreement that had been negotiated under which the organizations and railroads got together?

1126 A. Yes. We would call that a side trip up there to make that delivery because we weren't supposed to make a delivery only to the interchange track with the Virginia Railway, but this went beyond that up to the Gypsum plant.

Q. And by negotiations the railroad and the organizations got together and reached that agreement?

A. That is right. The four transportation organizations.

Q. There has been some testimony here about spur tracks only being two blocks or three blocks, and when going through the city where they may be longer than that. In your experience, aren't spur tracks frequently 1127 much more than two or three blocks?

A. I didn't understand all that.

Q. I say, a spur track isn't limited to two blocks. There is no definite limit to the length of a spur track, is there?

A. No. I would consider a side trip—

Q. I just asked you this first—I didn't ask about a side trip. There is no specific limit to the length of a spur track?

1128 A. Yes; to the end of it. You couldn't go no farther than that. Say, you asked me awhile ago in regard to another side trip. Want me to tell you about it?

Q. Which was that?

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A. The Armour Depot, Atlanta Division of Southern Railroad. 1129

Q. I was coming to that but I haven't asked it.

A. Go ahead. I thought you might want me to explain that now.

Q. You knew I was coming to it?

A. I have had a lot of experience with it, yes, sir.

Q. That was how long?

A. I don't really know; maybe two miles. I don't remember how far it was.

Q. It might have been two miles? 1130

A. Anyhow, I filed claims—my men filed claims in through freight service for a hundred miles. I progressed that claim through the regular channels up to the National Railroad Adjustment Board No. 1, and they ruled against me. I am not satisfied with it yet. I am not satisfied that they have got me beat. I may—you needn't put this in the record. I may file a declaratory judgment yet.

Q. But that involved a track, a spur track, of considerably more than a few blocks? 1131

A. A spur track is only coupled one end of it to the main line. I think that would be a pretty good definition.

Q. A spur track is a track that one end is coupled to the main line?

A. That is the way I would call it.

Q. And that particular track you were talking about is certainly over two miles?

A. Which one?

Q. The one you just spoke of. 1132

A. Yes, I think so.

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F. C. HARRISON

M. K. LLOYD

1133

Re-direct Examination

By Mr. Willmarth:

Q. Mr. Harrison, do you make any distinction between side trips on a track that comes to an end, say, four or five miles off, and side trips on a branch line track? Is there any distinction in your mind between those two situations?

1134

A. No; no, if the branch line track don't couple to the main line of the railroad which you start on, I wouldn't make a bit of distinction between it and one that didn't couple up to a main line.

Q. Either one is off of the man's regular assignment, is it not?

A. That is right.

(Witness excused.)

The Court: I think we might take about ten minutes.

(Short recess.)

1135

M. K. LLOYD, a witness for the defendant, after being sworn, testified as follows:

Direct Examination

By Mr. Willmarth:

Q. Will you state your full name, Mr. Lloyd?

A. M. K. Lloyd.

Q. Where do you reside?

A. Branchville.

Q. South Carolina?

1136

A. South Carolina, yes, sir.

Q. What is your occupation, Mr. Lloyd?

Appeal from Charleston County

M. K. LLOYD

A. Conductor, Southern Railway.

1127

Q. How long have you been employed by the Southern Railway?

A. Forty-one years in July coming.

Q. How long have you been employed as a conductor for the Southern Railway?

A. January 15, 1912.

(Two documents were marked Defendant's Exhibits "J" and "K".)

Q. Mr. Lloyd, handing you Defendant's Exhibit "J", I ask you to identify it, if you can?

1128

A. Yes, sir.

Q. What is it?

A. That is a bulletin advertising local freight run between Charleston and Columbia and Branchville and Andrews Yard.

Q. Does that run advertise the run from Charleston to Branchville off which at Pregnall these operations occur to the plants above Harleyville?

A. It is a run bulletined from Charleston to Branchville by Pregnall.

1129

Q. Is that the run to which we are referring here in this action?

A. Yes, sir.

Q. You have been in the court room throughout the testimony, have you not?

A. Yes, sir.

Q. Did you bid on that run?

A. Yes, sir.

Q. Handing you a document identified by the reporter as Defendant's Exhibit "K", will you identify that if you can?

1130

Southern Rwy. Co. v. Order of Rwy. Con. of America

M. K. LLOYD

110 A. That is the bulletin assigning the two different crews to these runs from Charleston to Branchville and Branchville to Andrews Yard?

Q. Were you assigned under that assignment, Defendant's Exhibit "K"?

A. Yes, sir.

Q. When did you start operating on that run, Mr. Lloyd?

A. As well as I remember, some time about June 12.

Q. 1944?

112 A. 'Forty-four, yes, sir.

Q. How long did you operate on the run?

A. Well, up until I believe in December, the latter part of November.

Q. 'Forty-four?

A. 'Forty-four. I went in passenger service.

Q. While you were on that run were you required from time to time to cut off at Pregnall and make a trip to these plants, the Ancor Corporation up above Harleyville?

114 A. Yes, sir.

Q. Under what circumstances did you make that trip, Mr. Lloyd?

Mr. Willmarth: I'll withdraw it and reframe my question.

Q. Under whose instructions did you make that trip?

A. Out to the plant, by the chief dispatcher.

Q. Did you make it every time you made the run?

A. No, sir.

116 Q. And when you made it did you always receive instructions to make it from the chief dispatcher?

A. Yes, sir.

Appeal from Charleston County

M. K. LLOYD

Q. Is that in anywise different from your handling ¹¹⁴ of station switching along the line?

A. Yes, sir, it is.

Q. In what respect is it different?

A. The stations along the line, the agents make out ¹¹⁵ a switch list to switch by.

Q. You switch by that switch list?

A. That is right.

Q. At each station along the line?

A. That is right.

Q. If the agent, for instance at St. George, some ¹¹⁶ morning would direct you to go to the Ancor Corporation above Harleyville, would you go?

A. No, sir.

Q. Why not?

A. Because I didn't have any instructions from the chief dispatcher.

Q. Handing you four documents marked by the reporter as Defendant's Exhibit "A-1", "A-2", "A-3", and "A-4", are those work instructions typical of the ¹¹⁷ instructions which you received from the chief dispatcher to make that side trip run up to those plants?

A. That is right.

Mr. Willmarth: Defendant offers in evidence Defendant's Exhibits "A-1", "A-2", "A-3", and "A-4".

(Documents heretofore marked Defendant's Exhibits "A-1", "A-2", "A-3", and "A-4" were received in evidence.)

Q. Handing you documents marked by the reporter as Defendant's Exhibits "B-1", "B-2", and "B-3", ¹¹⁸ are those instructions fairly typical of running orders over that track from Pregnall to the plants?

Southern Rwy. Co. v. Order of Rwy. Con. of America

M. K. LLOYD

1149 A. No, sir. This is not the order that we would get to go out on the branch.

Q. No. But are those orders?

A. Yes, I have received this.

Q. As to running your train over the branch?

A. Yes, I mean in order of No. 12, or something like that, this is the same order that I have received. When we went to the plant we got a different order from that.

Mr. Willmarth: The defendant offers in evidence Defendant's Exhibits "B-1", "B-2", and "B-3".

1150 (Documents heretofore marked Defendant's Exhibits "B-1", "B-2", and "B-3" for identification were received in evidence.)

Mr. Willmarth: I believe I offered Defendant's Exhibits "J" and "K" in evidence, Defendant's Exhibit "J" being Bulletin No. TM-46, Defendant's Exhibit "K" being the assignment for the run which I have offered in evidence.

(Documents heretofore marked Defendant's Exhibits "J" and "K" were received in evidence.)

1151 Q. Mr. Lloyd, did you, after you found you were being required to make this trip, discuss with your local chairman the question as to whether there was a violation of the rules?

A. Yes, sir.

Q. And did you feel that the rules were being violated?

A. I did.

1152 Q. Was it your understanding that your local chairman was taking the matter up with the railroad officials?

A. Yes, sir.

Appeal from Charleston County

M. K. LLOYD

Q. And subsequent to then, did you file time claims for this trip with the Southern Railway? 1153

A. Yes, sir.

Q. And did you claim—

Mr. Barnwell: I think the tickets are the best evidence. They are right in evidence.

Q. Handing you Plaintiff's Exhibits 1 and 4, are those exhibits duplicates of the original claim signed and filed by you with the proper officials of the Southern Railway?

A. Yes, sir. 1154

Q. Will you read from Plaintiff's Exhibit No. 1 what your claim was for?

A. "Side trip Pregnall to Harleyville Alumina plant and return to Pregnall. Continued on trip to Branchville."

Q. Were all your claims filed for this trip on the same ground?

A. Yes, sir. —

Q. Under what rule in the schedule which has been identified here as Plaintiff's Exhibit No. 12, were you claiming a violation and a right to additional compensation, Mr. Lloyd? 1155

A. I am not certain but I believe it is five or seven there. I disremember.

Q. It is a basic day pay rule, is it not?

A. That is right.

Q. A hundred miles or less, eight hours or less?

A. That is right.

Q. On what ground were you claiming a violation, Mr. Lloyd? 1156

A. That I was run out of my assignment.

Southern Rwy. Co. v. Order of Rwy. Con. of America

M. K. LLOYD

1187 Q. Mr. Lloyd, in your experience of many years as a conductor and as an employee of the Southern Railway, do you know of any run assigned as a straight-away run which has included in it a side trip operation off the line six or seven miles?

A. No, sir. I believe there is such trips mentioned in that book. But I don't know of any personally.

Q. Mentioned where?

A. In that.

Q. In Exhibit No. 12, the schedule you mean?

1188 A. Yes, sir. I think there are such runs as that in there.

Q. Are you referring to Article 28 of Exhibit No. 12?

A. Yes, sir.

Q. That is what you had reference to?

A. That is right.

Q. Those are runs specifically covered by the schedule agreement; is that not correct?

A. Yes, sir.

Q. But other than those you do not have?

A. I don't.

Cross Examination

By Mr. Barnwell:

Q. Mr. Lloyd, as I understand, you have been a conductor on the Southern Railway Company since 1912?

A. That is right; yes, sir.

Q. During that time you ran sometimes freight and sometimes passenger, or all the time passenger until '44?

A. No. I run freight trains for several years.

Q. Sir?

Appeal from Charleston County

M. K. LLOYD

A. Run freight trains for several years prior to my passenger work. 1181

Q. I mean you said that you continued on this particular run until '44 when you then went into the passenger? Had you been running passenger service before that?

A. Just as a trip every now and then.

Q. But your main service between 1912 and 1944 was as a freight conductor?

A. Yes, sir.

Q. Running sometimes on local freight and sometimes on through freight? 1182

A. Very little through freight work I done.

Q. So your work actually most of the time has been on these local freight trains?

A. Yes, sir, practically all.

Q. When a run is posted or bulletined, as I understand under the rules the company has to place a bulletin on so as to give the conductors or old members an opportunity to bid for it?

A. That is right. 1183

Q. This bulletin, when it went up you bid on that?

A. Yes, sir.

Q. There wasn't anything different in this bulletin or any other bulletin you had had for local freight?

A. No.

Q. It was a perfectly ordinary, regular and proper bulletin?

A. Yes, sir.

Q. It showed all information that was necessary in order to be able to bid?/ 1184

A. It was just a bulletin as a local freight between Charleston and Branchville.

Southern Rwy. Co. v. Order of Rwy. Con. of America

M. K. LLOYD

1166 Q. So when you bid on that you knew perfectly well
what your duties would be, didn't you?

A. Oh, yes.

Q. And you knew that that included switching all industrial tracks between Charleston and Branchville, didn't you?

A. That is right.

Q. And this particular Pregnall run, that had been there since the previous November before this was bulletined, wasn't it?

1166 A. I don't know when that track was finished.

Q. It was there some time?

A. I hadn't run down that way in a long time.

A. You hadn't been on the original 60 and 61 run?

A. No, sir.

Q. But as a matter of fact this Pregnall switch was there and was on the run between Charleston and Branchville at the time you made your bid?

A. No, I didn't know that.

Q. What?

1167 A. I didn't know that, no.

Q. You knew you had to switch all industrial switches?

A. I didn't know I had to go out to Harleyville.

Q. When you say "go out Harleyville," all that you did, wasn't it, was to run from the main line at Pregnall out to this alumina plant?

A. Most of the time, yes.

Q. But that was what you did, wasn't it?

1168 A. Occasionally I have found cars out there on the main line.

A. On the main line at Pregnall, that came from out there presumably?

Appeal from Charleston County

M. K. LLOYD

A. Well, I have placed one or two cars out there on the main line myself at Harleyville, right at Harleyville. 1166

Q. You placed cars at Harleyville?

A. Yes, sir, right at Harleyville.

Q. For the alumina plant?

A. No, sir. At the town of Harleyville.

Q. You placed cars at the Town of Harleyville for what?

A. Asphalt, for one thing.

Q. What? 1170

A. Several cars of asphalt was unloaded out there.

Q. Going to the alumina plant?

A. No, sir.

Q. Going where?

A. They was paving a road out there. Place right in the Town of Harleyville for unloading.

Q. How often did you do that?

A. Well, it wasn't very many of them. There was several cars. I wouldn't say how many.

Q. You placed cars there with asphalt to be unloaded? 1171

A. Yes, sir.

Q. Outside of that, all of the switching was done at the alumina plant?

A. Most of the switching was done at Preguall before we went out there.

Q. Then the switching was done at the alumina plant?

A. Probably make one or two switches out there. 1172

Q. But your main business was right there at Preguall?

M. K. LLOYD

1173 A. That is where we done most of the switching of the cars that went to the plant.

Q. So most of your time was really not taken in going out to the plant but most of the time was taken in switching at Pregnall, is that right?

A. Yes, in a way. It was switched at Pregnall because it was more convenient.

Q. Don't you know that that asphalt was for the Ancor plant road?

A. No, sir. I don't know who it was for.

1174 Q. You don't know?

A. No, sir.

Q. But it could well have been for the Ancor plant road?

A. It could have been, yes.

Q. And you placed the cars there because that was the most convenient place for unloading for that road, is that right?

1175 A. It was placed because it was given to me on a lighter to carry out there.

Q. You said that there was something unusual about your instructions because you got your instructions from the chief dispatcher. This was a non-agency station, wasn't it?

A. Yes, sir.

Q. So there was no agent at Pregnall, was there?

A. No, sir.

1176 Q. And the way to get your instructions has to be through the chief dispatcher?

A. Well, not necessarily. St. George agent governed that place.

Appeal from Charleston County

M. K. LLOYD

Q. There was nothing wrong with that, was there? 115
Nothing wrong with your getting instructions from the chief dispatcher?

A. It was a different procedure from what I had been accustomed to.

Q. Did you ever complain because you were instructed by the chief dispatcher rather than by the agent?

A. No, sir.

Q. You didn't have any ground for complaint?

A. It didn't make any difference to me, who. 116

Q. In your ticket there you speak about the Harleyville alumina plant. You are referring to this same plant that really was called the Ancor plant?

A. That is right.

Q. It had nothing to do with Harleyville. It was beyond Harleyville?

A. Yes, sir.

Q. And all your operations had to do with that Ancor plant except so far as you know about these asphalt cars? 117

A. That is right.

Q. While you were operating there that was the only industry that you served, wasn't that right?

A. No. I unloaded ballast out there on another track.

Q. That was when they were building that other track to the Volunteer Cement? 118

A. Yes, sir.

Q. Then that was another industry, wasn't it?

A. Well, I imagine it was.

Q. But outside of those two industries, that track didn't serve anybody else? 119

A. Not to my knowledge, no.

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M. K. LLOYD

1181 Q. With reference to those papers that were handed you, in all of these instructions where reference is made to Harleyville, that has reference to the Ancor plant, hasn't it? I mean that was where you operated?

A. Yes.

Q. Harleyville was generally used just as an expression to identify the plant?

A. I think so, yes.

1182 Q. Did I understand you to say these were actually not orders received by you at all; they were simply similar to orders which you had received?

A. That is right. I didn't notice the date of those. I don't think I handled those. I never noticed the date on them. But they are similar to orders put out.

Q. In other words, sometimes you would get orders to wait for another train to go by and things of that sort?

A. That is right.

1183 Q. That is about what that amounts to. As I understand, you were acting more or less under the advice, you might say, of Captain Utsey, the head of your local, in the handling of these claims?

A. Were you referring to me claiming the time?

Q. Yes, as to your claim.

A. No. I claimed them of my own free will.

Q. I mean you made the claim, you said under the basic day pay. Was that the rule you made it under or what?

A. Yes, sir.

1184 Q. That was the rule under which this claim was filed—the basic day rule?

A. Yes, sir.

Appeal from Charleston County

M. K. LLOYD

WASSELL G. MCCONAUGHEY

Mr. Barnwell: That is all.

Mr. Willmarth: That is all.

(Witness excused.)

WASSELL G. MCCONAUGHEY, a witness for the defendant, after being sworn, testified as follows:

Direct Examination

By Mr. Willmarth:

Q. Will you state your full name?

A. Wassell Gibson McConaughy.

Q. Where do you reside?

A. Route 6, Box 310, Naval Base.

Q. That is here in Charleston?

A. On the Dual Highway, yes, sir.

Q. What is your occupation, Mr. McConaughy?

A. At the present time extra conductor.

Q. Who are you employed by?

A. Southern Railway.

Q. How long have you been employed by the Southern Railway?

A. Since 1926.

Q. Have you been assigned to this run which operates between Charleston and Branchville and over which side trips are made from the intermediate point Pregnall to these plants above Harleyville?

A. As a conductor, only as an extra conductor from the extra board; as a flagman, on a regular assignment.

Q. When did you work on this run?

A. August 30, 1945.

Q. How long did you work on it?

A. Until approximately September 13 or 14; I forget the exact date.

Southern Rwy. Co. v. Order of Rwy. Con. of America

WASSELL G. MCCONAUGHEY

1180 Mr. Barnwell: What were the dates?

The Witness: From August 30, 1945, until approximately September 13 or 14.

By Mr. Willmarth:

Q. And you were on the extra board, as I understand it?

A. At that time I was emergency conductor.

Q. During that interval of time that you were working on the run, did the run stop at Branchville or did it go on through to Columbia?

1190 A. No, sir. I was operating 60 and 61 through to Andrews Yard, 128 miles.

Q. From Charleston to Columbia?

A. Yes, sir.

Q. Under what circumstances had that occurred, Mr. McConaughy?

A. By abolishing of the tri-weekly local between Charleston and Branchville and Branchville and Andrews Yard and establishing a local daily.

1195 Q. In other words, between those dates which you have referred to this run was re-established through from Charleston on to Columbia, as I understand it?

A. Yes, sir.

Q. As it had originally existed, is that not correct?

A. Yes, sir.

Q. Prior to the date it was split in two in June, '44. Now, making that run through from Charleston to Columbia, I believe you said it was a distance of 128 miles?

1200 A. Yes, sir. Or rather, that is what we were paid mileage for, was 128 miles.

Q. You were paid 128 miles?

A. Yes, sir.

Appeal from Charleston County

WASSELL G. McCONAUGHEY

Q. And such overtime, I assume, as you might accumulate? 1190

A. As accrued after ten hours and fourteen minutes.

Q. That is, if you were on the run more than ten hours and fourteen minutes, then you were paid overtime?

A. Yes, sir.

Q. For the time beyond ten hours and fourteen minutes. Now—

Mr. Barnwell: As I understand, this is all after he was employed? 1191

The Witness: That is correct.

Mr. Willmarth: They have in their prayer, your Honor, asked your Honor to determine these claims before the suit was brought and all similar claims in their complaint.

The Court: Up to the present, his testimony is simply that he was on that run from here to Columbia. What is the objection?

Mr. Barnwell: His testimony is that it was between August 30, '45, and September 13, '45, which is after the commencement of this suit. 1192

The Court: I know that; but nothing said yet affects the issue here.

Mr. Barnwell: I just said, I don't see how it could be relevant or admissible.

By Mr. Willmarth:

Q. Did you make side trips from Pregnall up to the plants during that time?

A. Yes, sir.

Q. Did you file claims for those side trips?

A. I did. 1193

Q. Were they denied?

Southern Rwy. Co. v. Order of Rwy. Con. of America

WASSELL G. MCCONAUGHEY

1197 A. Yes, sir. Filed the claim, mailed it to the time-keeper, Charleston, South Carolina, received a notice it was declined signed F. B. B.

The Court: That was during those two weeks that you were on?

The Witness: Yes, sir.

Q. That was when your run was 128 miles?

A. Yes, sir.

Q. And you were not paid anything other than your mileage for the run of 128 miles; is that correct?

1198 A. The mileage and overtime that I made on the run of 128 miles.

Q. On what ground did you file your claims?

A. Article 5, paragraph (a), I believe it is.

Q. And on what ground did you claim a violation of that article?

A. Under the same article. In other words, as operating a train assigned from terminal to terminal and making a turnaround within a straightaway run.

(A document was then marked Defendant's Exhibit "L" for identification.)

1199 Q. Handing you Defendant's Exhibit "L", I'll ask you to identify it if you can.

A. This is a form similar to what the chief dispatcher mailed to me on my arrival back in Charleston asking me to fill out in regards to movements made at Pregnall and of cars I had in my train for Pregnall, for Harleyville.

Q. Do you fill that form out with reference to the switching of other industries along the line?

1200 A. No, sir.

Q. Have you ever filled out such a form?

A. No, sir.

Appeal from Charleston County

WASSELL G. McCONAUGHEY

Q. To make sure that it is properly identified in the record, the form to which you have referred is identified as Defendant's Exhibit "L"? 1201

A. Yes, sir. That is what the chief dispatcher calls "100". We have to make one out on the going trip and one on the return trip from Pregnall to Harleyville, listing carloads and contents and the number of the cars going and the same returning.

Mr. Willmarth: Defendant offers in evidence Defendant's Exhibit "L".

(Document heretofore marked Defendant's Exhibit "L" for identification was received in evidence.) 1202

Q. Did you go out there regularly during the time you were on—or, you said you were an extra man, didn't you?

A. Extra man.

Q. Who instructed you to go out there?

A. I got my instructions from the chief dispatcher by message at Dorchester, South Carolina.

Q. Is that different than your instructions with reference to switching at industries along the line? 1203

A. The instructions I received, yes.

Q. In what respect?

A. For the simple reason he give me the classification of the cars, how they should be lined up before I went out there with them; such as if I had coal, it was to be first out. And other contents of the cars to be lined up according to his directions.

Q. Would you have gone out there had some agent along the line instructed you to go out there? 1204

A. No, sir, because I did not know of that line until such time as I received that message.

Southern Rwy. Co. v. Order of Rwy. Con. of America

WASSELL G. MCCONAUGHEY

1205 Q. When you went out there what switching did you do, Mr. McConaughy?

A. I had to pick up some cars, if I remember correctly, out of what is known as the passing track, a team track at Pregnall.

Q. Did you do any switching out at the plant?

A. No, sir.

Q. Where did you do it?

A. I done it at Pregnall.

Q. So that all you did was run?

1206 A. I had my instructions from the dispatcher to line my cars up at Pregnall before I carried them out there.

Q. And you went out there, either left a car or picked up a car?

A. I shoved the cars in what is known as the west track and went to the east track and got cars that he had instructed me to pull.

Q. Picked them up and—

A. And brought them back.

Q. You didn't do any switching around the plant?

1207 A. No, sir.

Q. From whom do you get your instructions with reference to industrial switching along the line, Mr. McConaughy?

A. The agent at agency stations.

Q. Where the industry is located?

A. Sometimes it is located there; sometimes on the line of road that he governs, such as Summerville. Now, the agent at Summerville governs what we call Peterman's Mill—new name, but it is still listed as Peterman's Mill.

1208 Q. Where is it with reference to this line?

A. Approximately about the 23-Mile, possibly.

Appeal from Charleston County

WASSELL G. McCONAUGHEY

Q. Off outside the line?

A. It is adjacent to the main line. The end of the spur is not over 75 feet from the main line.

Q. Do you do switching at these industries that you serve along the line?

A. Yes, sir.

Q. Mr. McConaughey, had you been ordered by your chief dispatcher to make that trip out to these plants and had done no switching whatever, would you have claimed a hundred miles?

A. Yes, sir.

Q. Why?

A. For the simple reason it was not in my assignment, and under Article 5, paragraph (a), that was the only ruling in which I know I could receive extra compensation, and it was not part of my assignment.

Q. In other words, you regarded the pay you were receiving as your compensation for the trip which you were making from Charleston to Columbia, is that correct?

A. That the run was assigned to, yes. Regardless of who was the assigned conductor, I was assigned on that day, as it was my job.

Q. That was your job?

A. On that particular trip.

Q. And you were being asked to do something outside your job for which you were not being paid, is that correct?

A. Yes, sir.

Q. I assume that very likely you accumulated some overtime with reference to this trip from Pregnall up to the plant, isn't that correct?

A. Yes, sir.

Southern Rwy. Co. v. Order of Rwy. Con. of America

WASSELL G. MCCONAUGHEY

1213 Q. And had you received an extra day, would not you have expected that additional overtime, whatever it was that accumulated in reference to that trip, to be deducted from the extra day which you would be paid?

A. Ordinarily, the procedure—that is the way it would be; that the overtime accumulated would be deducted from the hundred miles that I claimed if I had been paid the hundred miles for the side trip.

Cross Examination

1214 By Mr. Barnwell:

Q. Mr. McConaughy, on these trips from Charleston to Columbia and from Columbia back, which you ran as an extra as I understand—

A. As an extra conductor, but on these particular days after I was called to the job it was my job until I returned to my home terminal.

Q. And you probably accumulated overtime practically every day?

A. Not every day, no, sir.

1215 Q. But you did accumulate overtime frequently?

A. Yes, sir.

Q. And you put that overtime on your ticket, the original tickets?

A. Yes, sir.

Q. And you were paid for it all, weren't you?

A. Yes, sir.

Q. So that when you filed your supplemental claims, did you make any allowance for any overtime paid or anything like that? You put the overtime on that ticket, too, didn't you?

1216 A. On the supplemental ticket?

Q. Yes.

Appeal from Charleston County

WASSELL G. MCCONAUGHEY

A. No, sir.

Q. You didn't show the time that you had operated over and above?

1217

A. Showed the time that I operated over on that side trip was independent, was the time that I arrived at Pregnall, including the switching that I done in making the movement out to Harleyville, up until the time I returned to Pregnall.

Q. But you made no allowances for any overtime that you may have been paid for?

A. That was an extra trip altogether, as far as I was concerned with, and that was out of my assignment.

1218

Q. I mean, if you charged overtime for your work at Pregnall on your straightaway trip, you didn't make any allowance for that in the figure?

A. I charged the delay up on my straightaway ticket, yes, sir, but I did not charge any overtime up as the trip to Pregnall.

Q. You did charge your actual time there, though, didn't you? Your tickets were like these, weren't they? These are Captain Lloyd's.

1219

A. Similar to that, yes, sir.

Q. Doesn't he show the actual time at Pregnall, one hour?

A. Yes, sir. That is time consumed at Pregnall from the time he arrived there until the time he left Pregnall.

Q. That was the same as overtime, wasn't it?

A. No, sir.

Q. It was the time actually consumed?

1220

A. Time actually consumed at Pregnall in regard to this particular movement, but overtime—you do not

Southern Rwy. Co. v. Order of Rwy. Con. of America

WASSELL G. McCONAUGHEY

1221 know at the time you go out there whether you are going to make overtime or not, Mr. Barnwell. And we got to show this delay on the back of the service ticket. Have you got a regular service ticket there?

Q. Those are the regular service tickets.

A. The company requires us on the back of these time tickets for their own information to show any delay over ten minutes. Under ten minutes we do not have to show it. Not only on local freight but on all the trains.

1222 Q. What I am getting at is this. That is the service ticket?

A. That is the service ticket.

Q. Regular service ticket of Conductor Lloyd for September 7 in which he charges up overtime how much?

A. From 11:40 to 1:00 p. m.

Q. One hour twenty minutes?

A. Yes, sir.

Q. Pregnall?

1223 A. Yes, sir.

Q. That is chargeable to overtime. Then on his claim here he shows the same overtime at Pregnall?

A. That is not the overtime. That is the time consumed.

Q. It is overtime in one time ticket and time consumed in another?

A. It is not overtime in one ticket.

Q. Isn't it called there—

1224 A. No, sir. That is a delay. Overtime and delay is two distinct things. Overtime occurs on a job after eight hours.

Q. But it is included in both?

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WASSELL G. McCONAUGHEY

A. No, sir, that is included in the delay, and that shows time consumed in operation over that.

Q. But it is identical time, isn't it?

A. It has got to correspond. If it didn't correspond, why they wouldn't have no claim at all.

Q. So you spent an hour and twenty minutes, which was included in your overtime?

A. It was not included. That is the delay, Mr. Barnwell.

Q. Included in the total day's time?

A. Included in the total delay for that day, yes, sir.

Q. Included at the time you were paid for in the regular service?

A. I wasn't paid for that, no, sir. That wasn't my time ticket.

Q. No, no. I mean I am just using that as an example. Suppose your time ticket did have the same thing on it.

A. It might probably have.

Q. You say that there is a difference here about your line-up. Is there anything unusual about lining up your cars at the station before you take them out to the industry?

A. Yes, sir. It is the only place in 27 years' experience of railroading that I have on various railroads, including the Southern Railway, that the chief dispatcher has ever given me a classification on how to classify my train.

Q. That didn't make any difference—

A. Yes, sir, because the conductor is fully in charge of that train from the time he takes charge of it, that is, at the initial terminal, until he arrives at the final terminal.

WASSELL G. McCONAUGHEY

120 Q. Suppose you had gotten that same instruction with reference to the cars going to the industrial switch at St. George?

A. I would have got them instructions from the agent at St. George.

Q. I mean, so far as lining up the cars is concerned.

A. He wouldn't have told me how to line them up except how the industry of the cotton mill, as we call it, wants the cars to go in at certain doors.

Q. He had a perfect right to tell you to line them up?

1220 A. He can tell me how he wants them cars placed but he cannot tell me how to line those cars up in my train.

Q. So your contention now is that not only you worked overtime, but you have a grievance for the way the chief dispatcher—

A. No, sir. That is his privilege. I done the work and after I done the work, then I made a complaint.

Q. But you say he has a right to do that?

1231 A. Surely; he can tell me anything he wants to. I'll go ahead and do it and then make the complaint to it later.

Q. There was nothing wrong with him telling you?

A. As far as distributing my train, yes, sir.

Q. He had no right to do that? The Chief Dispatcher couldn't tell you how to line up?

A. No, sir. The conductor is fully in charge of his train from the time he accepts it, Mr. Barnwell, until the time he is relieved and he can classify that train and put them cars in the train so as he desires, but this was a special movement.

1232 Q. So you had a right to disregard his instructions if you had wanted to, is that right?

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A. No, I couldn't disregard them as far as that special movement was concerned. 1232

Q. You said you were in complete charge of the train?

A. Yes, sir. But that was a special movement. Something out of the ordinary; that I could not disregard at the time. But on my arrival at Charleston I made a complaint about it; by a time ticket.

Q. You didn't complain about lining up the cars?

A. It was an extra movement. It was a side trip.

Q. A minute ago you said something about a turn-around. 1234

A. Yes, sir. That is what it was.

Q. Which was it?

A. It was a straightaway run with a turnaround within it, or however they pronounce it. I don't know exactly how to explain the rule but—

Q. What was it—a turnaround or was it a side trip?

A. Well, the only way that I could list it on my time ticket was through a side trip.

Q. But now you testify it is a turnaround within a straightaway? 1236

A. That is the ruling under which I based it.

Q. Oh, I see.

A. Article 5, paragraph (a).

Q. When you made your ticket out you called it the Pregnall to Harleyville, the way these others did?

A. If I remember right, I think I called it making a side trip from Pregnall to Harleyville and return.

Q. As a matter of fact, what you are complaining about is a trip to the Ancor Corporation plant—it was two miles beyond Harleyville? 1238

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1227 A. I don't know whether the name of the place was Ancor or not. My instructions said to the Harleyville plant.

Q. It was called the Harleyville plant?

A. What the name of it was, Mr. Barnwell, I do not know.

Q. As a matter of fact, it was a plant which was two miles beyond Harleyville, wasn't it?

A. I wouldn't say it was two miles beyond Harleyville, no, sir.

1228 Q. It was beyond Harleyville? In other words, your operation just took you out to the plant and back; isn't that it?

A. Well, there was two switches out there. Shove the cars in one track and go to the next track and pull cars out.

Q. They were at the plant. You went through Harleyville and out to the plant? I'm not trying to mix you up, Captain. I just want to get the facts. You started at Pregnall and—

1229 A. According to my instructions, the plant was at Harleyville.

The Court: Was the plant in the Town of Harleyville?

The Witness: It was right at the edge of Harleyville, your Honor.

The Court: It wasn't two miles out?

1230 The Witness: Not being sarcastic or anything like that, sir, but I'm not a civil engineer to measure the terrain that I travel over.

The Court: You have got eyes?

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WASSELL G. McCONAUGHEY

The Witness: I know. But I might say from here 1241
to the edge of this court room, sir, is a half a yard, and
it is 500 feet.

By Mr. Barnwell:

Q. All that I am asking is that your operation was
from Pregnall to this plant, wasn't that right?

A. Yes, sir. That part of it was right. But as far as
me saying the plant was two miles beyond Harleyville,
I cannot say that.

Q. But you can say it was beyond Harleyville?

A. I'll say it was at the edge of Harleyville. 1242

Q. What do you call the edge?

A. Well, like the city limits; like you call Mt. Pleas-
ant Street here is the city limits. Everything beyond
Mt. Pleasant Street is the edge of Charleston, isn't it?

Q. I'm not trying to mix you up.

A. I know you're not going to mix me up.

Q. The testimony is it was two miles beyond Harley-
ville?

A. Just as I explained before. It was beyond Har-
leyville, but the distance I am not going to say be- 1243
cause I do not know. It might be three-quarters of a
mile and it might be five miles.

Q. And your operation was running from Pregnall
to this plant, whether it was on the edge of Harleyville,
two miles, half a mile?

A. Yes, sir.

Q. And so far as Harleyville was concerned, that
was merely the name used in designating that particu-
lar trip?

A. I don't know, so far as that name was to desig- 1244
nate the trip.

Q. As it was generally known?

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1245 A. No, sir. They have got it on one of their own forms; Harleyville plant.

Q. I am asking you wasn't that generally the designated name of the place?

A. Of the City of Harleyville? Yes, sir.

Q. You know Reed Branch?

A. Yes, sir, know it very well.

Q. That is a long branch runs way out to the Navy Yard?

A. Yes, sir.

1246 Q. And yet it is called Reed Branch. It goes far beyond Reed works?

A. It is right in the vicinity of Reed Works.

Q. It is probably a mile or two, several miles beyond Reed's before it ends?

A. I wouldn't say it gets over several miles. It is right in the vicinity of Reed's fertilizer mill.

Q. That is the local name for that particular place, isn't it?

1247 A. Yes, sir.

Q. That is all I am trying to get at. What is your employment now?

A. Conductor on an extra board.

Q. On the extra board?

A. Yes, sir.

Q. And that is what you were at the time you were making these runs?

1248 A. Well, that is what they called an emergency conductor at that time. I had a job flagging through freight and was called for that run on that morning to exercise my seniority.

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WASSELL G. McCONAUGHEY

Q. In making your trips from Charleston to Columbia, or from Columbia to Charleston, you switched a number of industries all along the line, didn't you? 1246

A. Yes, sir.

Q. And you ever have to switch this packing home track at Orangeburg?

A. No, sir.

Q. Packing house track?

A. No, sir.

Q. You are not familiar with that?

A. I am familiar with it but I have never switched it. 1250

Q. But you are familiar with it?

A. Yes, sir.

Q. That is about 3,000 feet long, isn't it?

A. Well, the difference between this track, Mr. Barnwell, and the one in connection that the dispute is about, is that that track was here in operation and being used at the time that I entered the service of the Southern Railroad and no telling how far back that track has been in use. Not only we use it, but the Atlantic Coast Line uses that track. 1251

Q. You never made any complaint about it?

A. To my knowledge, no, sir.

Q. This Pregnall track had been there for some time before you went on in '45, hadn't it?

A. To my knowledge, no, sir. Because in 1941 I was loaned to the Richmond Division and was up there for four years and during that time the whole Pregnall branch tracks was taken up. 1252

Q. That was way back there. But I mean, wasn't this thing constructed way back there at least two years—

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1253 A. I was not here at the time of the construction. I returned to Charleston in 1945, May 21, 1945, off the Richmond Division.

Q. So you know nothing about how long that had been in operation before you went on?

A. No, sir.

Q. But it had been switched right along?

1254 A. I couldn't tell you that. I know this was out of the ordinary for me to make that move out there that day and that is the reason I claimed the extra hundred miles.

Q. And that was just your idea?

A. No, sir. That was according to my agreement that I worked under. It was the regular work for the local freight.

Q. But 3,000 feet is a pretty substantial switch to make, isn't it?

A. I don't know. I haven't never switched that track.

Q. About that form that you said was Form 100?

A. Yes, sir.

1255 Q. What did you testify about that? That was something you had to fill in?

A. The chief dispatcher mailed me a copy of that form on my arrival to Charleston.

Q. That was before or after you started your run?

A. After I had made the run, on my return from Columbia. Asking me to fill in that form, according to the instructions, the questions asked on it.

1256 Q. How long was that after you started making your runs?

A. I got that the following night on my return from Columbia on August 31.

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Q. And that was the same day that you filed your time ticket?

A. I filed the time ticket dated August 30, 1945. That was going on the westbound trip.

Q. You had already filed the time ticket?

A. The ticket hadn't arrived to the timekeeper yet because we mailed all the mail; the time tickets and handling report and everything was mailed on arrival in Charleston.

Q. You don't know anything about why that was gotten out?

A. No, sir. It was unusual for me to have to fill out one of them for a special move. In fact, I had to call him up and ask him how he wanted it made out.

Q. But still, I mean you had no idea what it was all about. You just got instructions to fill it out and you filled it out?

A. No; I didn't fill it out until I had an argument. I kind of got some information before I filled it out.

Q. Who did you have an argument with?

A. I didn't have an argument but I got information.

Q. Who did you have an argument with?

A. I said I kind of argued about it a little bit before I filled it out with myself, discussing it with myself, and then I found out what it was about before I filled it out. That is just like, Mr. Barnwell, I come and hand you a paper and say, "Mr. Barnwell, sign this and fill it out for me." You going to fill it out without reading it?

Mr. Barnwell: That is all right. I just wanted to know who you argued with.

(Witness excused.)

E. O. UTSEY

1261 E. O. UTSEY, a witness for the defendant, after being sworn, testified as follows:

Direct Examination

By Mr. Willmarth:

Q. Will you state your full name, Mr. Utsey?

A. E. O. Utsey.

Q. Where do you reside?

A. 119 Fishburne, Charleston.

Q. South Carolina?

1262 A. South Carolina.

Q. By whom are you employed?

A. The Southern Railway.

Q. How long?

A. Forty-one years.

Q. What is your occupation at the present time?

A. Conductor.

Q. Do you also hold the position as local chairman of your local committee of adjustments for the Order of Railway Conductors?

1263 A. I am.

Q. How do you get that position?

A. I am elected by my local division.

Q. When did you first hear of this dispute regarding the run from Pregnall up to Harléyville and the plant?

A. It was during '44.

Q. How did you hear of it?

A. Well, the men, conductors on the run, said that they thought they were entitled to some compensation for making that trip out there.

1264 Q. What did you do as a result of your conversations with the men?

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A. Well, I told them if they thought they were entitled to it to send in the time. 1286

Q. Did you talk to any officer of the Southern Railway with respect to that?

A. Yes; I talked to Mr. Oglesby, who was superintendent here at that time during Mr. Birthright's absence.

Q. What was the result of your conversation with Mr. Oglesby?

A. Well, I tried to get the time claim paid and he said that he couldn't until he consulted his superior officer. 1287

Q. He would consult with his superior officers?

A. Yes.

Q. And during that time did you understand that he was making some investigation with reference to it?

A. Yes, I did.

Q. Then what happened?

A. Well, he left here in the meantime and Mr. Birthright came back as superintendent. I never did get any answer from Mr. Oglesby any more than the time tickets were being declined. 1287

Q. That went on some time, did it not?

A. Yes.

Q. Where did he go? Did he go to the Army?

A. No. He was transferred to some other division.

Q. Then Mr. Birthright was transferred in as superintendent; is that correct?

A. Yes.

Q. Did you contact Mr. Birthright and discuss the claims of these men with him? 1288

A. I did.

E. O. UTSEY

1270 Q. And what was the result of your discussion with Mr. Birthright?

A. Well, we had a right lengthy discussion and we come to the conclusion that we both of us were entitled to some compensation for making the trip out there and there was a suggestion that 13 or 14 miles would be a reasonable settlement.

Q. That would be over and above their pay for the trip from Charleston to Branchville?

A. Over and above the entire pay for the trip from Charleston to Branchville.

1271 Q. In other words, it would amount to pay of 113 or 14, or 15 miles; is that correct?

A. Yes.

Q. What did Mr. Birthright say?

A. He said that he would have to handle it with his superior officers before he could come to a settlement.

Q. And then did you later have anything definite from Mr. Birthright?

A. No.

Q. What did you do then?

1272 A. Well, I appealed the claims and turned them over to the General Chairman.

Q. From your experience on the Southern Railway, Mr. Utsey, and from your understanding of the schedule rules in Plaintiff's Exhibit 12, did you regard this run from Pregnall up to Harleyville as outside these men's assignment?

A. Absolutely outside their assignment.

Cross Examination

By Mr. Barnwell:

1273 Q. Do you remember when Mr. Oglesby came, Captain? When Mr. Oglesby came here?

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E. O. UTSEY

JAMES T. LAWRENCE

A. No, I don't remember the date that he came.

Q. It was several weeks after you started filing these tickets, wasn't it?

A. I couldn't say.

Q. He didn't come here until the end of September, did he?

A. I don't know, Mr. Barnwell, what time he came here. He was superintendent here and I had the discussion with him in regard to the tickets. ,

Q. But that was after you started filing these tickets. He didn't come here until after you had filed your first ticket on September 7?

A. Well, it may have been.

Mr. Willmarth: That is all.

(Witness excused.)

The Court: I guess that is about as far as we can go this afternoon. Recess until ten o'clock in the morning.

(Adjourned untill Wednesday, June 25, 1947, at 10.00 a. m.)

Charleston, S. C., June 25, 1947.

(The trial was continued.)

JAMES T. LAWRENCE, a witness for the defendant, after being sworn, testified as follows:

Direct Examination

By Mr. Willmarth:

Q. Will you state your full name, Mr. Lawrence?

A. James T. Lawrence.

Q. Where do you reside?

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1277 A. Knoxville, Tennessee.

Q. What is your occupation?

A. I am retired now. Was former General Chairman and conductor with the Southern Railway.

Q. That is, you were General Chairman for the General Committee of Adjustment of the Order of Railway Conductors for the Southern Railway?

A. I was until I retired, yes, sir.

Q. When did you retire?

A. On January 1, 1946.

1278 Q. I didn't just hear the date.

A. January 1, 1946.

Q. When did you become General Chairman?

A. In January, 1935.

Q. Prior to that time what was your occupation, Mr. Lawrence?

A. Well, for a number of years I had been passenger conductor and local chairman.

Q. Were you employed by the Southern Railway Company?

1279 A. Yes, sir.

Q. Since when?

A. Since October, 1895.

Q. Did you work for a number of years for the Southern Railway Company as a conductor in service?

A. I did from 1898, January, 1898, to 1935, when I went on General Chairman's job.

1280 Q. Referring to the claims of the conductors assigned to run between Charleston and Branchville, South Carolina, and their claims involved in this action for the side trip from Pregnall to the plants above Harleyville, how did those claims come to your attention?

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JAMES T. LAWRENCE

A. They were brought to my attention by letter from Mr. E. O. Utsey, the local chairman. 1281

Q. Were they referred to you for handling as general chairman in the ordinary and usual course of procedure with reference to disputes between the conductors employed by the Southern Railway and the Southern Railway?

A. They were, yes, sir.

Q. What steps did you take with reference to handling those claims and disputes?

A. I referred them to the General Manager and then personnel. 1282

Q. I didn't understand.

A. To the general manager.

Q. Did you discuss them with the general manager personally?

A. No; because he turned them down right off the reel.

Q. Then where did you take them?

A. Taken them to the personnel department.

Q. Who was that?

A. Mr. Travis. R. P. Travis. 1283

Q. He was acting as personnel?

A. Yes. Or Mr. Cox was, I don't remember. I think Mr. Cox was filling his place. He was sick at that time. I am not sure.

Q. Did you discuss the claims with them?

A. I discussed the claims with the personnel department, yes, sir.

Q. Did you attempt to arrive at a settlement of the claims?

A. I did. 1284

Q. What was the result of that attempt?

A. Flat refusal.

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JAMES T. LAWRENCE

1284 Q. Had you prior to the time this suit was commenced in June or July, 1945, advised the officials of the Southern Railway Company that you intended to process these claims to the National Railway Adjustment Board, First Division?

Mr. Barnwell: That was in writing, your Honor. I think we should have the best evidence.

The Court: Is it in writing?

Mr. Willmarth: It is in writing, I think; orally also, your Honor.

1285 The Court: Is that it you have got in your hand?

Mr. Willmarth: Yes; that letter.

The Court: Let Mr. Barnwell look at it.

Mr. Willmarth: I have asked Mr. Barnwell to produce the original and advised him prior to opening of court this morning that I would request the original of this letter.

(A document was marked Defendant's Exhibit "M".)

By Mr. Willmarth:

1287 Q. I am handing you Defendant's Exhibit "M". Will you identify that exhibit if you can, Mr. Lawrence?

A. I do.

Q. What is it?

A. It is a letter to Mr. Cox, who was acting for Mr. Travis at that time, addressed to him with reference to Conductor R. E. Bolchoz's claim of January 27, 1945.

Q. And was that letter sent by you?

A. Yes, sir.

Q. Over your signature?

A. Yes, sir.

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Q. What is the date on that letter?

A. Dated April 2, 1945.

Q. Was it deposited in the mails of the United States on April 2, 1945?

A. Yes, sir.

Q. Sufficient postage attached thereto?

A. Yes, sir.

Q. Will you read for the record the last paragraph in that letter?

A. Last paragraph reads: "Will you direct payment of the claim or advise if agreeable to disposing of same on basis of award in Conductor M. K. Lloyd's claim which will be submitted to the Board."

Q. Was M. K. Lloyd one of the conductors who had filed a claim for additional compensation for this run from Pregnall to the plants above Harleyville?

A. Yes, sir.

Q. And what did you mean in asking the Southern Railway if they were agreeable to disposing of Mr. Bolchoz's claim on the award of Conductor M. K. Lloyd's claim?

A. Yes, sir.

Q. I say, what did you mean?

A. What did I mean? To save progressing Mr. Bolchoz's claim up there. There was no necessity of taking them all up and that has been the custom; that where the claims are the same or similar, to base them on that award.

Q. That is, if in the event the Adjustment Board rendered a favorable award on Mr. Lloyd's claim, you were asking the Southern Railway to stipulate with you to abide by the award in Mr. Lloyd's claim with refer-

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1298 ence to all the other claims filed by the other conductors?

A. Yes.

Mr. Willmarth: Defendant offers in evidence Defendant's Exhibit "M".

(Document marked Defendant's Exhibit "M" was received in evidence.)

Q. The conductors on this run in dispute continued to file claims on and after that date, did they not?

A. They did, yes, sir.

1299 Q. They continued to file claims after the date of the suit in June or July, 1945, did they not?

A. Yes, sir.

Q. Were those claims referred to you for handling?

A. Yes, sir.

Q. And did you, as you have described, handle them with the operating officers of the Southern Railway?

A. Yes, sir. The rules were followed; schedule rules.

Q. Handing you Plaintiff's Exhibit 12, being the schedule contract between the conductors and the
1300 Southern Railway, I'll ask you if you as General Chairman of the General Committee negotiated that contract with the Southern Railway?

A. Yes, sir.

Q. Is there any rule in that schedule which specifies the amount of compensation a man shall be paid for making a side trip off of his regularly assigned run in local freight service?

A. No; except by negotiation where they paid and we go below the rule.

1301 Q. On what did you base these claims for additional compensation, Mr. Lawrence?

A. On Article 5 in the general practice.

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JAMES T. LAWENCE

Q. Will you read that article?

A. It is in section (b), Article 5: "In through freight or mixed train service, a straightaway run is a run from one terminal to another terminal; and not less than one hundred miles will be allowed for each such run, except as provided for in Article 28."

Q. Is a side trip off the run to a plant six or seven miles, off the straightaway run, a part of that assigned run?

A. It is not; unless so specified in the bulletin.

Q. What is it?

A. It is an extra trip.

Q. And would it not come under Rule 5(a) of the schedule, Exhibit 12?

A. Yes, sir. It is my conception of it.

Q. And be compensated as an extra trip?

A. Absolutely. Deducting the time from the time the man arrives at the station and prepares for this trip until he gets back and is ready to resume his trip.

Q. Has that always been the established practice and interpretation existing on the Southern Railway, that if a man was paid under Rule 5(a) an additional day for an extra trip, the time consumed in making that extra trip would be deducted from the claim of an extra day?

A. Yes, sir. Never did attempt to double up on them in any way. And when they would come to me ruling, if there was any error in the ticket that was the way it was based.

Q. Was that principle applied to claims for extra days for lapback trips?

A. Absolutely, yes, sir.

JAMES T. LAWRENCE

1291 Q. Was it applied to claims for additional day's pay under Rule 5(a) for a trip in which the man was ordered to make an additional trip on beyond his terminal, let's say four or five miles?

A. Yes, sir.

Q. And in each of those instances you would claim on the established practice and interpretation of the schedule Rule 5(a) an additional day, would you not?

A. That is right.

1292 Q. And would you ground that claim on the basis that the man had been required to make a new trip over and above his regularly assigned run?

A. I would, yes, sir.

Q. And in each of those instances the additional overtime, if any, which he accrued as a result of that new trip would then be deducted from the extra day?

A. That is right.

Q. That would be true, would it not, Mr. Lawrence, unless in making the new trip he accumulated overtime on that trip?

1293 A. That is right.

Q. Then you would not only collect for the time on his original trip plus overtime, if any accrued, but you would also claim the basic daily wage plus any overtime accrued on the new trip; is that not correct?

A. Yes, sir.

Q. Has there ever been any variation?

A. Not to my knowledge, no sir.

1294 Q. There has never been any variation of that established practice and interpretation in the application of these rules to the pay of conductors on the Southern Railway System?

A. Not to my knowledge, no sir.

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JAMES T. LAWRENCE

Q. Mr. Lawrence, handing you Defendant's Exhibit "G", will you tell me what that is, if you can?

A. Why, it is a settlement reached with the Southern Railway Company personnel department, C. D. Mackay.

Q. By whom?

A. By the four train and engine service organizations.

Q. Did you participate in the negotiations of that settlement?

A. Yes, sir.

Q. And signed and executed the instrument identified as Defendant's Exhibit "G"?

A. Yes, sir.

Q. That settlement is in reference to what type of run outside the man's regular assignment?

A. Lapbacks.

Q. Just read the definition of a lapback shown in Question 1 attached to Exhibit "G".

A. "1. As to lapbacks referred to in this Memorandum does this term mean a lapback made on the main line over which the train is moving between terminal and terminal or terminal and turning point or returning from turning point to terminal?"

Q. Is that your understanding of a lapback?

A. That is one of them.

Q. What is your other understanding of it?

A. Well—

Mr. Barnwell: I don't know, your Honor, that that is competent. He has put in evidence the official definition agreed to by both organizations.

Mr. Willmarth: All right; I'll withdraw the question.

Q. What other name do you have for a lapback?

JAMES T. LAWRENCE

1909 A. Well, a man can't make a lapback without making a turn. He has got to come back over the same territory; that is what it refers to. He returns over the same territory in making this lapback, a turn, or what they call it. And I have always tried to use in writing that "a turn within a turn" and a turn within connection with a straightaway run. Because a man has got to return over that track, unless there is a loop as was illustrated here yesterday.

1310 Q. So that when you say "turn within a turn", you mean the same thing as is meant by the word "lapback"?

A. I was trying to follow when we used that yesterday—I never heard of this "lapback"; I believe until Mr. Cox and Mr. Travis got up there; something I presumed they had learned in Chicago.

Q. You mean you never heard the term applied to that operation; is that correct?

A. I never heard it, no. It was always a "turn within a turn", a connection with a straightaway run.

1312 Q. And have you always prosecuted claims for an additional day when a turn within a turn was made by a local freight crew on an assigned straightaway run?

A. I have.

Q. And how much have you collected from the Southern Railway in the instances in which that situation has arisen?

A. I have collected a day.

1313 Q. That is because it is a new trip outside the man's regular assignment; is that correct?

A. Yes, sir.

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Q. I note that paragraph 3 of Defendant's Exhibit "G" states that "None of the provisions of this Memorandum apply to branch line" service. What is branch line service, Mr. Lawrence? 1313

A. Well, it is a term used on many accepted runs on branch lines. But you'll find I think in some of the general orders—that is, General Orders 27 which was introduced and Supplements 15 and 16—that branch line pay on some of the branch lines, on the majority of them, is just the same as it is on the main line.

Q. And are there exceptions to that under schedule agreements? 1314

A. There are.

Q. How is it paid otherwise?

A. By the exceptions speaks for itself.

Q. And is it usual for a crew working on a branch line to perform all the service up and down the line?

A. That is in one of the specifications, yes, sir.

Q. And that crew, I take it, can make a turn within a turn and branch line service?

A. Oh, yes. Sometimes so many trips or he does all the work on that, passenger and freight, if it is a really short line. Now, you take that on the Washington Division—I forget the name of that branch line; maybe Mr. Cox can tell me—it is only about ten miles out there somewhere. The man does all the work on that. 1316

Q. He works up and down that branch line?

A. Yes, sir.

Q. Whether he makes turns within a turn or not?

A. That is right. 1318

Q. And that is branch line service?

A. That is branch line service.

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JAMES T. LAWRENCE

1317 Q. It states that it doesn't apply to branch line specified service. What would specified service be?

A. Would be what the man was to do.

Q. On a branch line?

A. On a branch line.

Q. As provided in the schedule rules and the bulletin?

A. That is right.

Q. And what is a nominal service?

1318 A. Anonymous; that is another name for doing anything they wanted to do on that particular branch.

Q. Referring again to Defendant's Exhibit "G", will you read Question 2 attached to Defendant's Exhibit "G"?

A. "Question 2: Man enroute John Sevier to Asheville arrives New Line is directed to go to Morristown and get a car and return to New Line because he is not going to Morristown." Answer: "This being a side trip it is not covered by the Memorandum."

1319 Q. Referring to Question 2, is there a run assigned John Sevier to Asheville?

A. Yes, sir.

Q. A local freight run?

A. No. I think that—I don't know. I think that local freight run now runs out from Bulls Gap to Asheville.

Q. And is New Line an intermediate point on that line?

A. Yes, sir.

1320 Q. And Morristown is a point off the line; is that correct?

A. No. If you are going to Asheville, Morristown is off the line.

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Q. That is what I mean.

1321

A. But if you are going to Bristol it is on the main line. They branch at New Line.

Q. But referring to the run between John Sevier and Asheville, Morristown would be a point off the line?

A. Off the line, yes, sir.

Q. On the other line that crosses; is that correct?

A. Not crosses, but branches out that away. One goes straight and Asheville turns to the right.

Q. Have you collected claims for men assigned John Sevier to Asheville who were required to run up to Morristown and back?

1322

A. Yes, sir.

Q. And how much was paid to those men for that trip from New Line, an intermediate point, to Morristown, a point off of the line between John Sevier and Asheville?

A. A day.

Q. How far is it, if you recall, from New Line to Morristown?

1323

A. New Line is 91 and Morristown is 89; two miles straightaway.

Q. That is, it is two miles between New Line and Morristown?

A. That is right.

Q. Does this reflect the run of a man on a regularly assigned run between John Sevier and Asheville who had been directed at some specific time to make the trip up from New Line to Morristown?

A. Yes, except they have got this straight here.

1324

Mr. Barnwell: Is that something new or one of your exhibits?

JAMES T. LAWRENCE

1325 Mr. Willmarth: It will be used.

Mr. Barnwell: May I look at it?

Mr. Willmarth: Certainly.

(A document was marked Defendant's Exhibit "N".)

Mr. Willmarth: Defendant offers in evidence Defendant's Exhibit "N" to clarify this witness's testimony.

(Document marked Defendant's Exhibit "N" was received in evidence.)

1326 Q. Is that a regularly assigned crew and freight service?

A. That was a pool crew

Q. A pool crew?

A. Yes.

Q. However, that crew was engaged in freight service and assigned to the run between John Sevier and Asheville?

A. Yes, sir.

1327 Q. The line does extend on, I believe you said, beyond Morristown and around to Asheville by another route?

A. Yes. You can go through Morristown and go back to the main line at Asheville at Grove Junction.

Q. But these men weren't assigned to make that route around that way?

A. No.

1328 Q. Does it make any difference, so far as the compensation due a man under Rule 5(a) of the schedule, Exhibit 12, whether he is run off of his assigned run to a point up on a branch line or whether he is required to make a trip off of his assigned run to an industry four or five miles off of the assigned run?

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A. It makes a difference in the mileage; not for the switching. 1329

Q. I think perhaps you misunderstood me, Mr. Lawrence. So far as the side trip claim is concerned, does it make any difference whether that side trip is made on a branch line which serves, besides industries, the public generally, or whether the trip is made on a line of railroad that just goes off from the main line to some industry four or five miles beyond?

A. I would say not.

Q. Have you ever heard of that distinction being used by the officials of the Southern Railway before you heard it in this suit? 1330

A. I remember one case, I believe it was Emco, that the mileage of the run by going to Emco exceeded the 100 miles. And I handled it with Mr. Coyle and he raised the question: "We don't pay for switching industries." I said: "Mr. Coyle, we are not charging you for switching industries but it is for getting to them." And he allowed that additional mileage which run it up.

Q. This reference you made to Emco, was that an industry located some distance off of the assigned run of that crew? 1331

A. About four miles, I believe—something like that—off the main line.

Q. Was that a local freight crew?

A. That was a local freight crew at that time that handled it.

Q. And do you recall the points between which the run operated or the assignment operated? 1332

A. Not having the records with me, no. I have tried to forget a lot of that since I retired.

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1323 Q. Refreshing your recollection, was it between Chattanooga and Sheffield?

A. Yes, I believe it was. As I remember now, I believe it was through there.

Q. And do you recall how far it is between Chattanooga and Sheffield?

A. I believe—I don't remember now—not having to refresh my memory. I don't carry all that in my head because when I retired I tried to dismiss a whole lot of that stuff and get it out of there.

1324 Q. Can you give us an approximate distance?

A. Anyhow, it ran way over a hundred miles. I mean, something like 116 miles. Over a hundred.

Q. And this crew was assigned, I take it, between Chattanooga and Sheffield?

A. Yes, sir.

Q. To operate in a local freight service?

A. That is right.

Q. And do the switching along the line?

A. Yes, sir.

1325 Q. And that switching would include not only industries located along the line but other station switching, would it not?

A. Yes, sir.

Q. That would be included within their run, would it not?

A. Yes, sir.

Q. And this crew was doing that along the line, were they not?

Mr. Barnwell: I do object to the constant leading of the witness, your Honor.

1326 The Court: Yes. You are leading, Mr. Willmarth.

Mr. Willmarth: We'll let him answer. Be happy to.
(A document was shown to Mr. Barnwell.)

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Mr. Willmarth: That will be offered as an exhibit to clarify the defendant's testimony; not intended to be an exact replica. 1337

Mr. Barnwell: Was this prepared by Mr. Lawrence?

Mr. Willmarth: No, it was not. It was prepared under his direction and from information furnished by him, yes.

Mr. Barnwell: These are penciled things, your Honor. I think he has a right to draw them.

Mr. Willmarth: They were drawn under his supervision and under information we obtained from him. 1338

The Court: Of course, the rule in our State is that if the offered map or plat correctly represents the situation, it is admissible. If this witness would say that that correctly represents the situation that he is talking about, I think it is admissible.

(Document was marked Defendant's Exhibit "O".)

Q. Mr. Lawrence, handing you Defendant's Exhibit "O", I'll ask you if that correctly represents the run and the side trip down to the Emco plant which this local freight crew was required to make and to which you have referred previously in your testimony? 1339

A. From the best information furnished me, it is—

Mr. Barnwell: I can't hear you.

A. From the best information furnished me when I handled the claim, it is.

Mr. Barnwell: You're not familiar with it yourself?

The Witness: There is 8,000 miles that I had on the Southern Railway and a man can't remember every detail, Mr. Barnwell.

Mr. Barnwell: It doesn't seem to me that that is sufficient, your Honor. 1340

The Court: I think I'll let it in for what it is worth.

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1341 Mr. Willmarth: Defendant offers Defendant's Exhibit "O".

(Document marked Defendant's Exhibit "O" was received in evidence.)

Q. What claim did that crew make or file against the Southern Railway System?

A. It come to me that there wasn't being paid anything and I immediately handled it.

Q. What were they doing down at the plant at Emco?

1342 A. When they went down there, I don't know what Emco was or what the plant was or what they were doing, not having the papers before me, but they had to get the train. there was no way to run around—they had to shove it in there, back in there.

Q. Were they shoving in cars to some kind of plant at Emco?

A. Oh, yes. There were two industries out there, as I remember.

Q. Were they serving anything else at Emco?

1343 A. Not at that particular point—the two industries that were there.

Q. They were serving two industries down at Emco?

A. I think it was.

Q. Does that line extend on beyond Emco to form a branch?

A. My understanding is it stops at Emco.

Q. Did you handle these claims against the Southern Railway on behalf of that crew and was that crew paid an additional day on days which they were required and directed to go down to Emco?

1344 Mr. Barnwell: I think, your Honor, counsel is trying to put words in the witness's mouth.

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By Mr. Willmarth:

1345

Q. Tell me what you did with that claim and what happened.

A. When it come to me I handled with Mr. Coyle in one of the conferences up there. And I told him, I said: "According to the information in my hands, they are not being paid anything." Mr. Coyle, who is deceased now, he told me, said: "We don't pay for handling industries."—I mean for switching industries. I said: "I am not making any claim for the switching of industries but it is the mileage getting to it."

1346

Q. And then what happened?

A. He allowed the miles on that particular claim.

Q. That is, he allowed them miles in addition to the 116 miles on the regular assignment?

A. It made it over—anyhow, they got the extra miles for going down there.

Q. Was that or was it not in addition to the miles they earned between the two terminal points on their regular assignment?

1347

A. The two terminal points, no; they actually made that by going down there. It was added to the mileage between the two terminals.

Q. Approximately, you said, the distance between the two terminals—

Mr. Barnwell: Now he is doing the same thing practically, your Honor. This is his own witness.

Mr. Willmarth: I am not going to lead him. I just want to make positive the record is straight.

1348

The Court: Of course, all we want are the facts but we want the witness to tell us the facts.

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1349 Mr. Willmarth: I'll try to do the best I can. The witness is a retired elderly gentleman and he doesn't always understand my questions perhaps.

Q. How far did you say approximately the distance was between the two terminal points, Mr. Lawrence?

A. It was over a hundred miles.

Q. Assuming for the purposes of my question it was 116 miles.

A. Well, 116 miles, they paid him for going down there the actual mileage.

1350 Q. How much did they pay for the trip when they didn't make the run?

A. They paid the mileage of the run.

Q. One hundred sixteen, if that is the correct miles?

A. That is correct; yes, sir.

Q. How much did they pay on the days in which they did make the run?

A. They added the miles and paid for it at the mileage rates.

Q. Added to what?

1351 A. To the miles; the 116, if you want to put it that way. The mileage between the two terminals.

Q. And that was a special agreement with reference to that particular side trip which you reached?

A. Well, as I told you, they were running and paying nothing, was the information come to me. And when I handled with Mr. Coyle, he said they didn't pay for switching industries. I said, "I'm not asking you to pay for switching industries but I'm asking you to pay for the mileage reaching them. And that is our claim."

1352 Q. Do you recall any claims being filed with reference to the run from John Sevier to Tipperel?

A. I do.

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Q. Will you just explain what was done in that situation? 1363

A. Well, we had a local freight advertised from John Sevier to Tipperel.

Q. Go ahead.

A. And this local used to be advertised to Middleboro, four miles beyond Tipperel. We would go to Middleboro on L. & N. The trainmaster's attention was called to it, that they cut the run to Tipperel, and the statement was made that they would rather pay a hundred miles for going over there than to pay eight miles every day and get tied up in the yard. I think Mr. Cox is the man that ordered them claims paid. 1364

Q. Now, the run—

A. Wait a minute.

Q. Was run between John Sevier and Middleboro?

A. John Sevier—they used to change that local back and forth.

Q. And then they reassigned the run to where?

A. Tipperel. They have changed it several times to my knowledge in there—through freights and locals. 1365

Q. And where is Tipperel with reference to John Sevier and Middleboro?

A. Tipperel, as far as we own the track, we go four miles from there to Middleboro over the L. & N.

Q. If a crew was proceeding from John Sevier, which point as between Tipperel and Middleboro would they reach first?

A. Which point? He'd reach Tipperel.

Q. He'd reach Tipperel?

A. Yes, sir; if he was going out of John Sevier. 1366

Q. What basis did you collect an extra day's pay for going from Tipperel to Middleboro?

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1347 A. He was through his terminal, or out of his assignment.

Q. From where to where?

A. From Tipperel to Middleboro and return to Tipperel.

Q. How far is it from Tipperel?

A. Four miles; Sixty-eight, seventy-two.

(A document was marked Defendant's Exhibit "P".)

1355 Q. Handing you Defendant's Exhibit "P", is that a correct representation of the run to which you have referred between John Sevier and Tipperel?

A. That is correct.

Mr. Willmarth: Defendant offers in evidence Defendant's Exhibit "P".

(Document marked Defendant's Exhibit "P" was received in evidence.)

1359 Q. Will you refer again to Plaintiff's Exhibit 13, and I'll ask you whether Plaintiff's Exhibit 12 contains certain special agreements with reference to certain special side trip operations?

A. It does.

Q. Referring first to Article 5(a). Does Article 5(a) refer you to these special agreements?

A. I think it does.

Q. Will you read just the part to which it refers you in the contract of the special agreements covering certain specified side trip operations?

The Court: That is all in Article 28, isn't it?

1365 Mr. Willmarth: Yes, sir. I merely wanted to point out that Article 5(a) stated "except as provided for in Article 28."

Q. I'll ask you, Mr. Lawrence, to turn to Article 28.

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The Court: It is right here in the book.

Q. Have you found Article 28?

A. I have not.

The Court: Page 56.

A. That is a specified run. Article 28 is referring to circus trains.

Q. In which paragraph?

A. In the first one. The second paragraph refers to "~~Good Roads, Agricultural Cars,~~" and paragraph (c) of that refers to "Excepted Runs,"—Washington Division, Calverton-Warrenton, that was the run that I tried to call to your attention.

Q. Go ahead.

A. And refers to different ones and State University—I mean the third exception is State University Railroad.

Q. Describe that run for us.

A. That run is from—goes from the main line to Chapel Hill.

Q. The run, Mr. Lawrence.

A. The run?

Q. Yes.

A. It was an all service run. They operated it, and the company—

Q. Where does it start and where does it end and where does the crew go?

A. You mean the crew that performs that service now? From Durham to Pomona, 59 miles.

Q. Where with reference to the line that runs between Durham and Pomona is Chapel Hill?

A. Chapel Hill is up there at the college; goes from the main line, University at Chapel Hill; that is the station.

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Q. That is a line cuts off at an intermediate point from the main line between Pomona and Durham?

A. Yes.

Q. And how far does that line cut off to the college?

A. Twelve miles in each direction; 24 miles, I understand.

Q. And how does the crew run?

A. The crew operates from Durham to Pomona, or Pomona to Durham daily; as a local freight.

Q. And do they make the run up to the University?

A. Yes; certain days they do.

(A document was marked Defendant's Exhibit "Q".)

Q. Handing you, Mr. Lawrence, plat marked by the reporter as Defendant's Exhibit "Q", I'll ask you if that correctly represents the run to which you have just testified to?

A. Well, I'd say it does, yes, sir.

Mr. Willmarth: Defendant offers in evidence Defendant's Exhibit "Q".

(Document marked Defendant's Exhibit "Q" was received in evidence.)

Q. Can you turn in the schedule, Plaintiff's Exhibit 12, to the specific agreement covering that operation and the side trip operation?

A. Yes, sir; page 80.

Q. On page 80 of Plaintiff's Exhibit 12?

A. Yes, sir.

Q. And did you negotiate that agreement, Mr. Lawrence?

A. I did; with the other three general chairmen.

Q. For what purpose?

A. For what purpose? They were discontinuing service. I think they made application to take up the

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line. There was some protest up there, and the question was they couldn't run any trains up there not so assigned without paying extra for it. And we agreed to this as for actual mileage. 1369

Q. Over and above; is that correct?

A. Over and above, yes, sir; just as the agreement speaks for itself.

Q. Mr. Lawrence, has there ever been on the Southern Railway any interpretation or established practice by which men were run off of their regularly assigned run without being entitled to an additional day's pay for that run off the regular assignment under Rule 5(a), in the absence of some special agreement permitting another compensation to be paid? 1370

A. They have attempted to; usually paid for it.

Q. I didn't understand.

A. No; except as paid for. While they have declined the claims, it was eventually settled.

Q. You find any rule in that schedule, Exhibit 12, Mr. Lawrence, which provides that a man running on a regularly assigned run and run off on a side trip, whether it be to an industry or on a branch line, let's say three or four miles, should be compensated by the overtime which he might earn, if any? 1371

A. No, sir.

Cross Examination

By Mr. Barnwell:

Q. In the early part of your testimony, Mr. Lawrence, you said as a rule that you deduct time consumed on a side trip from the full day's pay?

A. I said that was the customary rule and was always done when the claims were settled by me.

Q. Don't you mean that in your negotiations you reached an agreement, but there is no rule whatsoever? 1372

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1273 ever? It is just an agreement with reference to that particular claim, isn't it?

A. It is referred to in that memorandum and also in the rules, but I said, Mr. Barnwell, that we didn't try to penalize them twice; if you call that a penalty. Therefore, that when we made this similar side trip, from the time the men arrived there, and you'll find it in every case—

Q. In other words, sometimes you would settle on a purely mileage basis, wouldn't you?

A. Sometimes, yes; if it was agreed to.

1274 Q. And sometimes it didn't make any difference what the situation may have been, you would reach an agreement and that determined what happened in that particular case?

A. That is right.

Q. But there wasn't any rule about overtime being deducted in the settlement because you mightn't settle on a basis of overtime or a day's pay at all, might you?

1275 A. Well, I told you, and I stated, that it was customary and the rule—I mean the rule of practice—

Q. You don't mean—

Mr. Horlbeck: Don't interrupt him.

A. That when we made a side trip from the time we arrived at the point, that we left the regular assignment, until we returned, was ready to leave there, should be deducted from that side trip or turnaround, or whatever used.

1276 Q. Isn't it just as much a rule that when you would make one of these settlements it would be agreed that would not apply to any other, but just a settlement of what you were settling and not as a precedent?

A. Not as a precedent; that is right.

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Q. I mean that is just as much a rule as what you just stated, isn't it? Isn't that a rule? 1977

A. Well, I don't know who would be passing upon that. I don't attempt to, Mr. Barnwell, to answer for nobody but myself.

Q. But the custom is that when you make these settlements the agreement is that it would not be considered a precedent?

A. Well, in some cases.

Q. As a general rule?

A. Not as a general rule. 1979

Q. You testified with reference to bulletin that is in evidence and you read Question 2, I think—I don't know that you read Question 3—in which they said those are side trips. You remember in that—I'll hand it to you. Referring to Question 2 and Question 3, Defendant's Exhibit "G", you conceive that those are proper definitions of side trips, don't you?

A. Well, that is what was agreed to as side trips.

Q. No; you say you don't agree to it because it is not covered by this Memorandum. 1979

A. I said that was the agreement on the side trips, so far as this, Mr. Barnwell.

Q. I ask you whether those two statements are or are not your understanding of what is meant by a side trip?

A. What is meant by a side trip?

Q. Yes.

A. I think one of our answers to that, when it said that Morristown was not a lapback but was a side trip—I mean was a side trip. And Question 2, was that what you were referring to? 1980

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1381 Q. I am asking you whether you regard those statements as to what side trips are as correct definitions or explanation of what is a side trip.

A. Well, that is what we agreed to was a side trip.

Q. Suppose you hadn't agreed to it, isn't that your understanding of what a side trip is?

1382 A. Well, as I told you, I'd never—and if you want to know what was used as a side trip, it used to be a turn within a turn, a turn in connection with a straight-away run, but I had to modernize that language a little bit after two personnel officers, two distinguished officers, went one time to Chicago.

Q. You said that, I think, with reference to lapback, didn't you?

A. I don't think I did.

Q. You think a lapback and a side trip and a turn within a turn are all the same?

A. I said you couldn't make a side trip or a turn within a turn without going over the same territory.

Mr. Willmarth: A side trip, Mr. Lawrence?

Mr. Barnwell: I am cross examining.

1383 Mr. Willmarth: I think he is confused.

The Witness: I said you had to turn over the same unless there was a divergent route.

By Mr. Barnwell:

Q. With reference to this Defendant's Exhibit "N" that was handed to you, it appears that on this sketch there had been drawn a continuation of the railroad beyond Morristown and then it was rubbed out. As a matter of fact, that is a railroad that runs through Morristown right on up, isn't it?

1384 A. Yes. But we only showed to Morristown as where the man went to.

Q. I see.

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A. That line runs from Memphis to Bristol and on to Washington. 1284

Q. It is a main line run on which Morristown is located?

A. That is right.

Q. Main line track, I should say.

A. Main line—is a main line over there and there is I don't know how many; at Morristown, 35 or 40, or maybe more.

Q. You were testifying, I believe, to some matter with reference to a place called Emco? 1285

A. Emco, I believe.

Q. Emco. Were you in court yesterday when Mr. Keister testified?

A. I think I was, yes, sir.

Q. That was one of the matters he testified about, didn't he?

A. About Emco, yes.

Q. You heard him?

A. I heard him.

Q. He gave a pretty clear and complete statement of that case? 1286

A. Of that case. He gave a pretty clear statement of it, yes.

Q. What he said was a correct statement?

A. They are running an extra crew there now from Sheffield to Emco. At this time they didn't have it when I handled it with Mr. Coyle.

Q. But Mr. Keister's explanation of that Emco operation was a correct one, was it not?

A. It is virtually correct. There is no difference in his testimony and my testimony. I was testifying to the settlement reached with Mr. Coyle. 1287

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1280 Q. As I understand, Mr. Lawrence, prior to the negotiating of that special agreement, Defendant's Exhibit "G", with reference to lapbacks, that was not specifically covered by the contract at all, was it?

A. I think it was and always contended it was. We made certain concession in there, reducing claims from 100 miles to 50, as shown in the agreement, to reach a settlement when we had several hundred claims pending. It was a concession to the company when we wrote that article.

1280 Q. But still, that is the agreement which undertakes to define what a lapback is?

A. It does after that time. Prior to that time I won several cases, Mr. Barnwell.

Q. With reference to what?

A. With reference to turnaround and lapbacks, or whatever you want to call them.

Q. What about side trips?

1291 A. Well, as I told you, until we adopted that language—I tried to get modern on it—we always referred to them, as they are, turns or what not. We defined them, said we would use it in the future, but the man has got to return over the same unless he goes off the cliff somewhere.

Q. Just what is your definition of a side trip?

A. Of a side trip? Is anything off the man's regular assignment.

Q. That is your understanding of a side trip. What is your understanding of a main line?

A. Of a main line?

Q. Yes, sir.

1292 A. A main line is where they run trains in all directions. If it is a single track they run them in both

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directions: double track, they run them according to specified directions. 1293

Q. What is your understanding of a branch line?

A. Of a branch line? It is built on a branch. May have passenger service; may not; and it is called a branch.

Q. Has stations?

A. Sometimes it has stations and sometimes it don't.

Q. Has it got agents?

A. Why, I don't know. It could have all that. They may have an agent and they may have a non-agency.

Q. You don't undertake to define what a branch line is, then? 1294

A. A branch line?

Q. Yes, sir.

A. If a man goes there from the main line, I don't care what it is, that book defines branch lines and any exceptions.

Q. Is there any definition in the book of branch line?

A. I don't know; don't know what you would call a branch line.

Q. Aren't you quite familiar with that contract? Didn't you negotiate it? 1295

A. I think I did.

Q. Well—

A. Sometimes they call what I define as a main line—from Memphis to Bristol just now—I find some people on the Southern call it a branch line. They call Washington to Atlanta the main line.

Mr. Willmarth: Mr. Lawrence, try and answer Colonel Barnwell.

Q. You take the one you just mentioned; that is how long? How long is that line you just mentioned? 1296

A. The line from Washington to Atlanta?

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1297 Q. No; the one you said they sometimes call a branch line.

A. Well, I believe it is about 500 miles or more. It goes on—

Q. And you consider that a branch line?

A. I don't.

Q. I'm asking you what you consider a branch line.

A. What I consider a branch line, I told you, was built for a particular purpose.

Q. What purpose?

1298 A. Handle passengers or freight.

Q. Go ahead.

A. Handle passengers or freight and serving industries, or whatever the company wants you to do.

Q. Is there any difference between a spur track and a branch line?

A. A spur track and a branch line?

Q. Yes, sir.

A. I wouldn't make any.

Q. You would not?

1299 A. Absolutely not.

Q. You make no distinction between a spur track, an industrial switch, and a branch line?

A. No, because some branch lines are the same as a spur; it only has one ending to it.

Q. So it is your idea of a branch line as any line that runs off from a main line?

A. That is right.

Q. And that includes a spur track, switch; anything that runs off of a main line is a branch line?

A. It may be. I don't have the naming of them.

1300

Q. You don't have the naming of them?

A. No; no.

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Q. According to your definition does a branch line have stations on it or run regular trains or have telegraph service or any of those things? 1401

A. I am just judging what has been considered branch lines, Mr. Barnwell. There are some stations on it; some telegraph offices. There may be none.

Q. I understand you to say you handled all of these claims?

A. No; I didn't say that I handled all the trains. I said I handled all the claims.

Q. Claims is what I said.

A. It sounded to me very much like trains. 1402

Q. Will you refer to the Plaintiff's Exhibit No. 1 and Plaintiff's 13-A. Those are the first tickets filed by Conductor Lloyd, I think.

A. Mr. Barnwell, what tickets? They are coupled together here. There is one out. Which one do you want me to refer to?

Q. Just the top one. Those are the same dates. That is the regular time ticket, isn't it?

A. I think so, yes, sir.

Q. Isn't it? 1403

A. Yes.

Q. You can see that is. You handled it?

A. I didn't handle the ticket. I handled the claim.

Q. But that is the ticket on which the claim was based, isn't it?

A. It is one of them, yes.

Q. And on the back of that you find what?

A. On the back of this?

Q. I don't want you to read it. Do you know what those notations mean? 1404

A. I never made a time ticket in ten years; from '35 until I retired in '46.

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1495 Q. You have made them out—you know what that is on the back?

A. Oh, yes.

Q. What is it?

A. It is delay report.

Q. Do you find in there a delay report for Pregnall marked Pregnall to Harleyville, I think?

A. Find 11:40 to 1:00 p. m. One hour and twenty minutes. Going from Pregnall to Harleyville, yes, sir.

1496 Q. That is included in the overtime charged on the front of the ticket, isn't it? I say, it is included in the overtime?

A. I am just glancing to see. I wouldn't take anybody's word for anything.

Q. No, sir; I don't want you to.

Mr. Willmarth: Try and answer the questions.

A. I'm trying to answer it and I am not confused a bit.

Q. No; I'm not trying to mix you up a bit, Mr. Lawrence.

1497 A. Shows two hours and five minutes here, but I'd have to take and figure it.

Q. No; I don't ask you to figure it. I just want you to identify what is written there.

A. I believe that Mr. McConaughy explained that yesterday; he had to give a delay for everything.

Q. This regular time ticket shows total time on duty under pay, ten hours and five minutes; isn't that right?

A. That is right.

1498 Q. And that includes the hour and twenty minutes delay?

A. That is the one I told you I'd have to figure on and see; see whether they both tally.

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Q. But assuming that the conductor who made this out made the proper addition, it is supposed to be in there, isn't it? That is what he is charging for? 1409

A. Yes.

Q. Now then, in the supplemental ticket the actual time for which a day's pay is claimed is an hour and twenty minutes, isn't it? That same hour and twenty minutes shown on the back of the other one?

A. There isn't no back to that.

Q. The back of the other one. I say, that is the same hour and twenty minutes, isn't it?

A. It shows an hour and twenty minutes going to Preggnall. 1410

Q. What?

A. Shows an hour and twenty minutes for going from Preggnall to Harleyville.

Q. Then that is in fact two claims for the same work, isn't it?

A. It seems there was no settlement reached on that. I told you it has always been customary to cut it out when it was reached.

Q. Talking about the claim; two claims for the same work, isn't it? 1411

A. I don't know.

Q. Now, I call your attention—I think you have Exhibit 12?

A. Yes.

Q. I call your attention to Article 6. Would you mind reading that?

A. No, indeed.

Q. Page 8.

A. I know where it is. Article 6: "In all classes of service, other than passenger, conductors' time will commence at the time they are required to report for 1412

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1413 duty and shall continue until the time they are relieved from duty at end of run."

Q. "~~Shall continue~~"—that is a continuous service from the time they report for duty until they are relieved from duty in any run?

A. That is right.

Q. In other words, from terminal to terminal?

A. That is right.

Q. Pregnall is not the terminal, is it?

A. It is when you go—No; Pregnall is not the terminal.

1414 Q. Pregnall is a non-agency station, isn't it?

A. It may be a point, non-agency station, handled by Dorchester.

Q. On the run between Charleston and Branchville?

A. Pregnall? Yes.

Q. Do you find any other condition in the contract where it says that a man on a run can have his run interrupted in the middle of it when another day's work is performed and then resume the regular run?

1415 A. You mean the schedule? I don't remember now—why?

Q. I mean is there anything in your contract which permits that? You have just read 6.

A. I read 6. What article do you refer to?

Mr. Willmarth: Repeat the question.

By Mr. Barnwell:

Q. Is there anything in the contract which says that a man on a run can have his run interrupted in the middle when another day's work is performed and then the regular day's run continues?

1416 A. Well, he has got to obey instructions.

Q. But there is nothing in the contract?

A. No; it says straightaway or turnaround.

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Q. And it is a continuous run, isn't it, from terminal to terminal or from terminal back to the beginning?

1417

A. The turning point and where they start from; in making a turnaround.

Q. As I understand, with reference to all of the examples which you gave, except the one as to Emco which you say Mr. Keister fully described, those are these excepted runs that are in the Exhibit 12, aren't they?

A. Yes; some covered by it.

Q. In other words, at first when you said you couldn't remember on the Washington Division—

1418

A. Calverton-Warrenton.

Q. That is what you had reference to?

A. Yes.

Q. With reference to this other one, State University Railroad, that is an entirely different railroad, isn't it? State University Railroad?

A. Southern Railway has handled it ever since I have known anything about it.

Q. But it is a different railroad—you know that—it says—

1419

A. University, yes; it is a different railroad but the Southern paid for all the service up there and handled it and have since 1895, so far as my knowledge is concerned.

Q. Chapel Hill is on the line and that run is from Chapel Hill up to the University; is that right?

A. That is right.

Q. This Tiprell-Middlesboro example you gave is also one that is in the book on page 60—is one of the exceptions, isn't it, under Knoxville Division, top of page 60, second paragraph?

1420

A. That is Appalachia Division.

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1421 Q. Second paragraph at the top of the page 60, John Sevier-Tiprell-Middlesboro?

A. Yes.

Q. That is the one you were talking about?

A. Yes. John Sevier-Harriman Junction-Oakdale through freights are on turnaround basis.

Q. Now, the next one; read the next one.

A. "John Sevier-Tiprell-Middlesboro through freights are on turnaround basis."

Q. That is the one you were talking about?

1422 A. I was talking about a local; and so stated, Judge.

Q. You were not talking about this particular exception?

A. No. They can run them. They are on turnaround basis but when they advertise them to Tiprell the company saves the mileage on them, and as I explained, this local had run to Middleboro and into Tiprell also. They have a right to run them. It is so advertised but to save eight miles every day, they cannot.

Q. Middleboro is on the L. & N.?

1423 A. Why, certainly.

Q. So a part of that railroad is L. & N. and part Southern?

A. That is L. & N. railroad. I suppose we operate the trackage right.

Q. Referring back to this Emco case, as I understand, was reached by agreement between you and Mr. Coyle?

A. That is right.

1424 Q. And that was confirmed in a letter to you from Mr. Coyle?

A. I think so.

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Q. Will you read that and tell me if that is the letter that was received by you confirming the agreement dated June 5, 1939? 142

Mr. Willmarth: I haven't seen that letter.

Mr. Barnwell: He is going to read it out.

Mr. Willmarth: It seems to me you insisted that I show you documents that I had. I have no objection, however. Go ahead.

By Mr. Barnwell:

Q. Will you read that out, please? 143

A. Yes, sir.

Q. That is the letter you received confirming that agreement? 144

A. Yes, sir.

Q. Please read it.

A. June 5, 1939, Washington. That is a copy of it, yes, sir. (Reading) "Mr. J. T. Lawrence, General Chairman, Order of Railway Conductors, Knoxville, Tennessee. 145

"Dear Sir: 146

"Referring to previous correspondence and our conference on May 19 in regard to the claim of Conductor F. J. Tipler, Memphis Division, for pay for the additional mileage made in going to the Emco plant at Hobgood.

"This will confirm my advice to you in our conference that we will, without precedent, pay the additional mileage in this case with the understanding that our so doing will not be urged or used in any way in connection with any existing case or any case which may arise in the future. You advised me that this 147

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1429 disposition of the matter was satisfactory to you and therefore I have issued instructions accordingly.

"Yours very truly,

(Signed) H. A. COLE,
Personnel Officer.

"Copy to Mr. Keister:

"In connection with your letter of May 29, file G-3-1 Memphis.

1430 "Will you please instruct accordingly so far as the conductors are concerned.

"I have today written General Chairman Mullen and Scott that we are agreeable to disposing of the matter with them on the same basis, and will advise you later if they accept the proposal.

H. A. C."

Q. Do you know whether they did accept it on the same basis?

A. No, I do not.

1431 Q. So, as I understand, that case was settled with the understanding that it would not be urged or used in any way in connection with any existing case or any case which may arise in the future; that is correct, isn't it?

A. That—why, he put that in there.

Q. But that is the correct statement of the agreement that was reached?

A. I think so. They very often—the company does—very often say "We'll settle this, so and so, without precedent."

1432 Q. And that is the understanding when it is settled?

A. That is right; when it is understood that way.

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Re-direct Examination

1433

By Mr. Willmarth:

Q. Mr. Lawrence, directing your attention again to the letter which you have just read into the record, which you received from F. A. Coile, dated June 5, 1939, and referring your attention to the statement that "This will confirm my advice to you in our conference that we will, without precedent, pay the additional mileage in this case with the understanding that our so doing will not be urged or used in any way in connection with any existing case or any case which may arise in the future." Tell me whether or not that language was used voluntarily by Mr. Coile or whether or not that was your agreement with Mr. Coile? 1434

Mr. Barnwell: I don't know, your Honor, that that is competent. He has admitted that that is the agreement.

The Court: Let's let him answer it now and see what he says.

A. Why—

The Court: Is that your agreement with Mr. Coile? 1435

The Witness: He just agreed to pay the mileage. When the question come up, he said that "We don't pay for industrial switching." I said, "Mr. Coile, we are not penalizing you or attempting to penalize you, but the man was making over a hundred miles and he is due some compensation."

Q. And what was your agreement with Mr. Coile?

A. Well, not being put in memorandum form, I wouldn't attempt to say, Mr. Willmarth. That was in 1939. 1436

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1427 Q. Does the carrier in writing letters to you sometimes use language which was not understood in your oral conversations with the carrier?

Mr. Barnwell: Your Honor, I object. That is irrelevant and incompetent; far afield. It has nothing to do with this case.

Mr. Willmarth: He started to answer you as to what the practice was with reference to these letters.

1428 The Court: I don't know. Here is a letter. It is common sense that people negotiating a settlement sometimes have negotiations and then under the well-known rule of contracts, the negotiations are crystalized when the letter or agreement is finally reached. Everything is crystalized there.

By Mr. Willmarth:

Q. I'm asking you whether that was his agreement, that he settled for all time on the Southern Railway, all claims for side trips?

A. No; no. Had no reference to that.

1429 Q. Did you understand, or was that the agreement with Mr. Coile—for all time you had settled all claims which might arise in the future as to side trip claims?

1430 A. No. We have handled many claims and I think it is the experience of every man that has been a general chairman or local chairman, when he gets up there they cut out their "without precedent," to pull the letter on you later. Then you get that letter confirming that—any memorandum that my signature is to, I'll stand by it. But he used that lots of times—"without precedent." So finally it come down to a point, I said, I'll never accept another one, a letter with "precedent".

1431 Q. Mr. Lawrence, turning to another point that was raised in your cross examination, will you give us

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what you mean when you refer to the term "side trip"? Just tell us what the operation is. 1441

A. I told you, Mr. Willmarth—that is, I told Mr. Barnwell—that I tried to modernize some of my language to please Mr. Cox and Mr. Travis.

Q. I'm not asking you as to modernization of the language but I'm asking you to tell us—just describe the type of operation that you have in mind when you use the term "side trip".

A. Well, side trips is out and back. They may either go a diverse route, or, as a matter of fact, you come back over the same track. 1442

Q. Out and back from where?

A. Point you start from.

Q. Well, let's take an intermediate point. Where would he go?

A. Where you are directed to go.

Q. Do you mean out and back on the main line over which he has just traveled?

A. Well, if he was making a side trip, it don't make any difference whether it was a side trip or a branch line. An extended industrial track away out. 1443

Q. Off the main line?

A. Off the main line.

Q. What do you mean when you talk about a "lap back"?

A. A lapback is where you go and come back. It is very few times since I wrote that memorandum that we have used it. I always in the most of my claims, when they were referred to me, would make them "turns within turns", "turns in connection with straightaway runs". 1444

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1445 Q. Is a lapback or a turn within a turn made on the man's assigned run or over the territory over which he has just operated?

A. No.

Q. Where is it?

A. A side trip or any extra trip that way is made off his assignment unless included in there.

Q. Possibly you didn't hear my question. Where is a lapback or a turn within a turn made?

1446 A. A lapback or turnback is covering the territory that you have already once covered and not in your assignment.

Q. Is that the same thing as a side trip?

A. You have got to come back over the same territory or go to a divergent route.

Q. In a side trip?

A. In a side trip.

1447 Q. I think that is correct, Mr. Lawrence. And I am not trying to talk about terminology in these questions. I am merely asking you what operation the crew makes and where they go.

A. They go where directed, do what directed, and come back to the starting terminal—I mean the point from which they start.

Q. In making a side trip is the crew operating on the assigned run?

A. I said not unless so advertised and agreed to.

Q. Handing you Plaintiff's Exhibit No. 16, did you negotiate that agreement, Mr. Lawrence?

A. I did.

1448 Q. Do you recall where those crews were assigned, between what points?

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A. They were assigned from John Sevier to Oakdale and return. The local was assigned between John Sevier and Oakdale. 1449

Q. Local what?

A. Local freight.

Q. And that crew was an assigned crew in local freight service between John Sevier and Oakdale?

A. Yes, sir; as I recall now.

Q. What was the occasion for that memorandum, Plaintiff's Exhibit 16?

A. Well, the memorandum was occasioned by the men filing claims for going to Jones Yard. 1450

Q. Is Jones Yard a point on the assigned run?

A. No. There was nothing about them going in there. They were pool crews all except this one local

Q. Where is Jones Yard?

A. Jones Yard is one mile—a little over a mile—one mile, I believe, off leading out from Blair, 41 miles from Knoxville.

Q. Where is Blair?

A. Blair is between—do you want the final terminals? John Sevier and Oakdale. 1451

Q. Where is Blair?

A. Forty-one miles from Knoxville.

Q. On the line between John Sevier and Oakdale?

A. That is right.

Q. Handing you Defendant's Exhibit "1", does that correctly portray the run to which you have referred?

A. I think so. It is off to the left going north.

Q. That operation of that crew from you say Blair is an intermediate point on this run?

A. That is right; 41 miles from Knoxville. 1452

Q. And Jones Yard is down a mile?

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1453 A. That was built by the Government. They called it Jones Yard.

Q. When that crew operates on that assignment, leaving Oakdale and gets to Blair and goes down to Jones Yard, what kind or what term would you apply to the operation which that crew makes between Blair and Jones Yard?

A. Well, you can call it a turn within a turn or you can call it a side trip.

Q. You call it either one?

1454 A. You can call it either one. Because he returns over the same track. That is the only single difference.

Q. Mr. Lawrence, can you make a side trip off of the assigned run on a branch line?

A. Not provided for unless it is provided in his assignment.

Q. The crew could be directed?

A. Oh, yes. I told you we had to obey instructions.

Q. Is it possible to have a side trip on anything else than a branch line?

1455 A. Oh, yes. This was not a branch line. It is down there to the Jones Yard where the atomic bomb—as that engineer referred to yesterday—plant is.

Q. And does it make any difference whether that side trip is on a branch line or on a line that leads into the industry, in so far as your schedule rules, Exhibit 12, are concerned?

A. None whatever.

Q. On what ground would you claim additional pay for that side trip, whether it be branch line or to an industry or somewhere off a main line?

1456 A. On the same ground it is not in his assignment. He was out of his assigned territory when he went there.

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Re-cross Examination

By Mr. Barnwell:

Q. You have just been testifying to this Blair. I understood you to say the Blair situation was what brought about this agreement?

A. That is right.

Q. That was also one of the cases that Mr. Koster testified to quite fully yesterday, didn't he?

A. He mentioned Blair, yes.

Q. You heard his testimony?

A. I did.

Q. What he said was a pretty clear and correct statement of the facts, wasn't it?

A. I think so.

Q. You say this was a settlement of that matter. Will you read paragraph 3 at the bottom of page, Plaintiff's Exhibit 16, bottom of the first page, paragraph 5?

A. "This settlement is made without admission, precedent or prejudice by or against either party and is only in settlement of this particular matter."

Q. And that is signed by you and all of the others?

A. General Chairmen; that is right.

Q. You read just now a letter to you from Mr. Coile, Personnel Officer. Is this your answer?

(A document was handed to the witness.)

A. That is a letter to Mr. Coile.

Q. That is the answer to the letter you just read, wasn't it? It refers to the letter of June 5?

A. Well, I think so.

Q. It is?

A. If I had both of them—

Q. That is the one you read just now?

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A. That is the one.

1461

Q. And this is Mr. Coile's answer to you, to this letter? Is that right?

A. Yes.

Q. Will you read this letter of June 12, your reply to Mr. Coile's letter to you?

A. I read it once.

Q. Read it aloud. I want to get it in the record.

A. "June 12, 1939, Knoxville.

"Mr. H. A. Coile, Personnel Officer, Southern Railway System.

1462

"Dear Sir:

"Referring to your letter of June 5 in regard to the claim of Conductor F. J. Tipler, Memphis Division, pay for additional mileage made in going to the Emco plant at Hobgood, Alabama, you make no mention of the claims of Conductor J. W. Best, which claims were similar to those of Tipler's as he was on the opposite run. It was my understanding you would instruct that all claims on this branch would be paid and that the additional mileage would continue to be paid to conductors operating local freight between Stevenson and Sheffield, for actual mileage made in going to and from Emco plant; and that this settlement would not be used against you in similar cases if such should arise at other points."

1463

Q. Who is it signed by?

A. That is signed by me.

Q. So it is in reply to Mr. Coile's letter you definitely stated that your understanding was just as he said, should not be used; is that correct?

A. That is correct.

1464

Mr. Barnwell: That is all.

(Witness excused.)

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J. A. RAYNES

The Court: This is a good opportunity to take ten minutes out.

1465

(Ten-minute recess.)

J. A. RAYNES, a witness for the defendant, after being sworn, testified as follows:

Direct Examination

By Mr. Willmarth:

Q. State your full name, Mr. Raynes?

A. J. A. Raynes.

1466

Q. And where do you reside?

A. Danville, Kentucky.

Q. What is your occupation, Mr. Raynes?

A. General Chairman of the Conductors' General Grievance Committee for conductors on Southern Railway System.

Q. That is General Chairman of the General Committee of Adjustments of the Order of Railroad Conductors for the Southern Railway Company?

A. Southern Railway System, yes, sir.

1467

Q. In other words, your jurisdiction on behalf of the conductors covers both Southern Railway Company, plaintiff in this action, and its associated lines?

A. Yes, sir.

Q. Or companies?

A. Yes, sir.

Q. When did you assume that position, Mr. Raynes?

A. January 1, 1946.

Q. Prior to that what was your occupation?

A. Conductor.

1468

Q. By whom were you employed?

A. C. & O. T. P. Division of the Southern Railway.

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1469 Q. How long have you been employed by the Southern Railway?

A. Since April, 1906.

Q. And what work did you perform for the Southern Railway?

A. I entered the service in 1906 in the signal department; transferred a short time later to the maintenance department; a short time later I transferred to the clerical department; in 1911 I entered train service as a brakeman. In 1920 I was promoted to a conductor.

1470 Q. Did you serve as brakeman or conductor in the employ of the Southern Railway Company from the date you have mentioned to the time you were elected General Chairman of the General Committee of Adjustment for the Order of Railway Conductors?

A. Yes, sir. From 1911 until 1945, December 31.

Q. Are you familiar with the term "side trip"?

A. Yes; I think I am, sir.

Q. And what does that term mean to you?

1471 A. A side trip would be a trip off on a diverging line of railroad, either over a main line division or a branch line extending from the main line on which you was assigned.

Q. Does it have to be on a branch line?

A. No, sir.

Q. Where else can it be?

A. It could be on another part of your main line beyond your terminal.

Q. If a line runs up to a plant three or four miles off the main line, could there be a side trip on that line to the plant?

A. Yes, sir.

1472 Q. Would you refer to that as a branch line?

A. Generally, we understand them as branch lines.

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Q. And is it or is it not immaterial to you in so far as the compensation of the conductor is concerned whether the carrier may serve the public generally or whether the carrier may serve only an industry located at the end of that line?

A. There would be no difference.

Q. That is, if I understand you, there would be no difference in so far as the conductor's compensation was concerned?

A. That is correct.

Q. If a local freight conductor was assigned to a straightaway run and was required to make a side trip off that run, whether it be on a branch line or whether it be on any line diverging off of his straightaway run to some point off the run, three or four or five or six, or any number of miles off that run, would that operation and service performed for making that trip off of his straightaway run be included within the compensation which he would receive for the trip between the terminals on the run?

A. No, sir.

Q. If you were operating that run, how would you claim of the Southern Railway Company additional compensation for making that side trip off the main line?

A. Under the basic day rule, Article No. 5.

Q. Now handing you Plaintiff's Exhibit No. 1, I'll ask you to tell me, if you can, what that is?

A. That is a claim for making a side trip, Pregnall to Harleyville, the alumina plant, and return to Pregnall.

Q. Does it show on there the overtime which the man accumulated in making that trip or the time, rather, which he accumulated in making that trip?

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1477 A. Yes, sir.

Q. And how much time does it show?

A. It shows one hour and twenty minutes making the trip.

Q. From where to where?

A. From Pregnall to Harleyville and the alumina plant and return to Pregnall.

Q. At the end of that run that man will turn in, will he not, the total time elapsed on the run including the time that elapsed from the trip from Pregnall up to the plant?

1478 A. Yes, sir.

Q. And in the event that overtime has accrued, or in the event that the run being less than 100 miles overtime has accrued beyond eight hours, will that time be shown as overtime?

A. Yes, sir.

Q. And will it include the time which elapsed and was consumed in making the side trip from Pregnall up to the plant?

1479 A. Yes, sir.

Q. This man has filed a claim against the Southern Railway Company for an additional day for that trip; is that not correct?

A. That is correct.

Q. If that additional day is allowed to him for that trip under Rule 5(a), will he also in addition to that collect the overtime or the time spent in making the trip in the event it has been included in overtime?

A. That part of the overtime claim account of the time consumed in making the side trip will be deducted.

1480 Q. From the claim as allowed?

A. From the claim as allowed.

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Q. Has or has not that been the usual established and customary practice in handling time claims by conductors on the Southern Railway System so far back as you can recall?

A. It has.

Q. Has the contract schedule, Exhibit 12, ever been construed to provide that overtime was the specified compensation for extra service outside the assigned run?

A. Not to my knowledge.

Q. And if overtime did accrue on the assigned run and if in making the side trip overtime over and beyond eight hours, assuming less than a hundred miles on a side trip, also accrued, would you not claim overtime then for both trips?

A. Overtime as a practical operation could not accrue on both trips.

Q. Let's assume the man consumed in allowing this trip Charleston to Branchville, without any reference to the side trip, nine hours. How much overtime would be included in that trip?

A. From Charleston to Branchville, there would be one hour overtime.

Q. Now assume it took him an additional nine hours to make the trip from Pregnall up to the plant above Harleyville. What claims would he file against the Southern Railway Company?

A. Well, he would file a basic day and one hour overtime. If the operation was such that he had authority under the law—

Q. I understand that.

A. To continue that second trip—

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1485 Q. Excluding the Sixteen-Hour Law from your mind for the moment, so far as the compensation to the man is concerned.

A. In the absence of a Sixteen-Hour Law provision, in making his trip from Charleston to Branchville, being on duty nine hours, he would be entitled to 100 miles pay and one hour overtime. If he was required to make a side trip from Pregnall to Branchville during the course of that nine-hour operation, which required nine hours to make the side trip, he would be entitled to 100 miles and one hour overtime for the
1486 side trip.

Q. That, of course, is ignoring all references to the Sixteen-Hour Law?

A. Correct.

Q. Mr. Raynes, have in specific instances special agreements been negotiated between the Order of Railway Conductors General Committee and the Southern Railway for less compensation than provided in schedule Exhibit 12, as to a specific side trip operation?

1487 A. Yes, sir.

Q. What is your understanding of the established custom and interpretation with reference to a specific agreement of less compensation on a specific side trip operation as to whether that then governs all side trip operations?

Mr. Barnwell: Your Honor, I don't think the witness is going to testify at all. I object to the leading question.

Mr. Willmarth: I'm asking him what his understanding is, your Honor.

1488 The Court: I think the question is all right up to the present.

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Mr. Willmarth: I have finished the question.

1488

The Court: Give him full opportunity to say yes or no.

A. Where agreements have been reached to pay less than a minimum day for a side trip, that agreement would apply only to the particular run or service for which it was negotiated.

Q. And what agreement, if any, would apply to a different side trip operation other than one where the special agreement controlled?

A. The basic day rule, Article No. 5.

1490

Q. You are referring specifically to the schedule in evidence?

A. The schedule or schedule of wages, rules, and working conditions in effect.

Q. Would or would not that rule apply until a special agreement was negotiated for less compensation for that particular side trip?

A. Yes, sir.

Q. Mr. Raynes, directing your attention to Plaintiff's Exhibit 11, will you indicate by your observation of that exhibit where the yard limit boards are at Preggnall?

1491

The Court: That has been testified to already, hasn't it?

Mr. Willmarth: It has by the plaintiff, your Honor, but not by us.

The Court: Nothing he can do can change the map.

Mr. Willmarth: I am not trying to change the map, your Honor.

A. The yard limit board is indicated by this blue-print 5,301 feet west.

1492

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1493 Q. Are they not on either side of Pregnall on the main line running through from Charleston to Branchville?

A. On the main line governing the approach to Pregnall.

Q. That side trip line running off up to the plant, is it within the yard limit of Pregnall?

A. The switch leading from the main line only. The line to Harleyville is not in the yard limits.

Q. Is it or is it not true that branch lines frequently diverge off within yard limits?

1494 A. Yes, sir.

Q. And side trip lines may diverge off within yard limits?

A. Yes, sir; they may.

Q. Is it your understanding that these men operate up there under yard rules?

A. I didn't get the question.

Q. Is it your understanding that these men operate from Pregnall up to the plants under yard rules?

A. No, sir.

1495

Cross Examination

By Mr. Barnwell:

Q. In your early part of your testimony, Mr. Raynes, you first testified that you were a conductor on the, I think, C. & O.?

A. C. & O. T. P. Division.

Q. Railroad, isn't it?

A. Yes, sir.

Q. That is not the Southern Railway, is it?

A. No, that is not the Southern Railway but operated by them.

1496

Q. But you were a conductor on the C. & O. T. P., weren't you?

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A. Yes, sir.

Q. And not on the Southern Railway Company?

A. Not on the Southern Railway.

Q. So that when you testify as to customs, rules, regulations, or anything of the sort, you are testifying as to those with reference to the road with which you worked, aren't you?

A. I didn't get that.

Q. I say, when you testify as to customs, rules, regulations and so forth outside of the contract, you are testifying as to your knowledge and experience with reference to the C. & O. and T. P., aren't you?

A. Yes, in that respect, so far as personal knowledge is concerned, it applies to the C. & O. T. P. Knowledge on other parts of the Southern Railway System has been obtained through a study of files and records submitted to me by the individual division employees, conductors, in other words.

Q. And that has been only since you have been General Chairman?

A. Yes, sir.

Q. As I understand, under your definition of a side trip, the length is not material?

A. Not necessarily.

Q. So that you mean to say you could have a side trip which was less than a mile and you could have a side trip which was as Mr. Willmarth said, fifty miles?

A. Yes, sir.

Q. What is known as an industrial switching track is a well-known meaning in labor circles, hasn't it?

A. Yes, sir.

Q. What do you understand by it?

A. Industrial switching tracks.

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1501 Q. Aren't they the tracks that lead from the main line to an industry?

A. Generally, yes.

Q. And to your knowledge, does it make any difference whether that track is owned by the company or owned by the industry? Are you familiar with that phase of the situation?

A. I don't think the ownership would have any material—Well, it would be of no material difference to us.

1502 Q. In other words, you have industrial switching tracks that are entirely owned by the, say, C. & O. and T. P., and you will have industrial tracks which may be owned by the industry but so far as you are concerned it makes no difference?

A. Under our rules it would make no difference.

Q. Are you personally familiar with the situation at Pregnall?

A. Not personally, no.

1503 Q. So that when you testify about Pregnall conditions here, you are only testifying what you have been told and what you have heard and what you understand to have been the case?

A. My testimony is based upon the evidence and records of the claims.

Q. That is the extent of your knowledge?

A. Yes, sir.

1504 Q. You were given a hypothetical question that if it took nine hours to operate straightaway run from one terminal to another and nine hours to make an unassigned side trip, that you would claim overtime in both cases. That was your testimony, I think.

A. For each of the trips.

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Q. And that was based on the assumption there was no such thing as the Sixteen-Hour Law, wasn't it? .

A. Yes, sir.

Q. As a matter of fact, there is such a thing, very definitely, isn't there?

A. Quite right.

Q. And no such case could possibly arise?

A. It could under an exceptional condition; a wreck or similar emergency, where the crew could be authorized to exceed the Sixteen-Hour Law provision.

Q. And under those conditions you have special rules and regulations covered by the contract?

A. That would be governed, of course, by the superintendent in charge of the division.

Q. And the law fixes how that is handled, doesn't it?

A. Yes, sir.

Q. With reference to yard limits, Mr. Raynes, you have boards at certain points on the main line; is that right?

A. Yes, sir.

Q. And then if the yard limit is limited you'll have other boards indicating the limit of the yards, don't you, in other directions?

A. Yard boards located on either side of stations are for governing of trains, other trains operating over that particular part of the territory, which provides a restrictive speed under Rule 93. And would not govern the movement on a branch line.

Q. Not talking about a branch line. Suppose you have an ordinary industrial switch, say 500 feet long; isn't that train still operating under yard limit rules when it is operating on that industrial switch? It doesn't have any special orders or anything of the sort, does it?

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1509 A. The yard limit boards would cover the operation of other trains over that part of the territory, and the crew working within that territory would be governed by yard limit rules in performing all of its switching service between those boards.

Q. Including the switching out to the industrial track, we'll say, 500 yards away?

A. Near or adjacent to the main line.

Q. You just testified you fix no limit on the length of the tracks over which a side trip is made, didn't you?

1510 A. That is, diverging routes. I would fix no limit as to the length of a diverging route track.

Q. Long or short?

A. No, sir.

Q. How do you reconcile your testimony, then, to saying that this line, so far as the rules are concerned, is not within the yard limits? It is operating under yard limit rules, isn't it?

1511 A. Yard limit rules is prescribed by Rule 93 governing all switches leading to and from the main track within the confines of those boards.

Q. But doesn't that include the operation of switching on the spur that runs off from it?

A. No, sir.

Q. Ordinarily, doesn't a train operate under orders?

A. Yes, sir.

Q. And there are no special orders with reference to the handling of a switching movement within the yard limits, are there?

A. I didn't quite get your question, Mr. Barnwell.

1512 Q. There are no running orders, I said special orders—there are no running orders with reference to the movement of freight train, local freight train, in

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switching that industrial spur or any other spur track like that, is there?

A. Not generally required, no, sir. In performing the switching within a terminal or within the confines of yard limit boards, train orders are not necessary. Train orders are only for the movement of the train on the main line.

Q. Is that the same as running orders?

A. Running orders.

Q. So that when you are switching at a station all of the operations on that are done without any running orders. They are simply done under the general custom of what is necessary for switching that?

A. Under switching instructions.

Q. Which are handled by the conductor?

A. Yes, sir.

Q. His instructions, though, are merely as to where the cars are to go, the order in which they are to be placed, maybe, and various things of that sort, isn't it?

A. That is quite right.

Q. Can you go outside of a yard without running orders?

A. On the main line? No.

Q. When do you have running orders other than on the main line?

A. Go outside of yard limits without running orders?

Q. Yes, sir.

A. You cannot operate on the main line without running orders at any point either in or out of yard limits.

Q. But you do operate on industrial switches without running orders?

A. You can operate on industrial switching or do station switching on team tracks, house tracks, loading tracks without train orders.

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1517

Q. Within yard limits?

A. Within yard limits.

Q. Do you draw any distinction between a main line track and a main track?

A. No, sir.

Q. But there is a difference between a side track and a side trip?

A. Yes, sir.

1518

Q. In the operation of a local freight train between terminals, there are usually a great many industrial tracks to be switched, aren't there?

A. Yes, sir.

Q. And that is a part of the operation of a local freight, isn't it?

A. Industrial tracks leading from stations or between stations which are near or adjacent to the main lines within station limits, yes, sir.

Q. And that is what is known as industrial switching, isn't it?

A. Yes, sir.

1519

Q. And that is a very essential part of railroad business, isn't it?

A. Yes, sir.

Q. And the local freight conductors get higher pay than the through freight conductors partly because they have to do that extra work?

A. Yes; and because it is a slower train movement.

Q. And those conductors are also guaranteed the pay for every day that they should have worked, whether they work or not, don't they? That is another advantage that the local freight conductor has?

1520

A. They are guaranteed that if they are ready for service themselves.

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Q. What I mean is, suppose we say under this trip in one direction he is to go Tuesday, Thursday, and Saturday. Now, if for any reason that run on Saturday isn't made and he is in a position where he can make it, he gets full pay although he does nothing? 1521

A. He gets a minimum basic day.

Q. Suppose you have a conductor on a run from A to B; those are the terminals; and on that run we'll say there are twenty industrial tracks ranging from 500 feet to five miles. Would the conductor put in claims for 21 days' pay for the run if each track were switched? You have got 21 industrial tracks from 500 feet to five miles. 1522

A. It would depend upon the distance those tracks extended diverging from the main line.

Q. I understood you to say that didn't enter into it at all.

A. If they were parallel and near the station there would not be any claims for the ordinary industrial switching.

Q. Didn't I understand you to testify that the length of the track made no difference whatsoever to it? 1523

A. Generally speaking, it doesn't, with the exception of where it diverges entirely away from the main line.

Q. And there is no point where one becomes something else under the contract, is there?

A. The practices—

Q. That is, the contract?

A. Many years have developed what would be known as local industrial switching.

Q. Answer my question. I say, so far as the contract, there is no point at which it changes from switching industrial switching to a side trip? 1524

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1725

A. There is no rule that specifically covers it. It is covered by practice.

Q. And so far as practice is concerned, I understand that you have to limit your testimony to what was the practice on C. & O. T. P.; that is right, isn't it?

A. I have a general knowledge of the practice on many divisions of the Southern Railway.

Q. But only such information as you have been able to pick up since you have been—

A. From files and records of claims that have been filed.

1526

Q. Can you give me any example of a case where the difference between an industrial switching and a side trip was based solely on length?

A. You have had recited here in this testimony a side trip claim from Blair to Jones Yard, which is one mile.

Q. That wasn't based solely on the length of the trip, was it?

A. It was based on the principle of making a side trip not within the assignment.

1527

Q. Sure. But it had nothing to do with the length. They finally settled on the basis of the mile, wasn't it?

A. The length had nothing to do with the subject-matter particularly.

Re-direct Examination

By Mr. Willmarth:

Q. Mr. Raynes, is it your understanding that the claim of these men—that they are claiming for industrial switching?

1528

A. No, sir. They are not claiming for industrial switching.

Q. What are they claiming for?

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A. For making the side trip run, that is not included in their assignment. 1529

Q. Have you ever known of a claim for an extra day being filed by a local freight crew for industrial switching?

A. I have no knowledge of any.

Q. During the years you have worked on the Southern Railway, has not the conductors' contract applied to you?

A. Yes, sir; all the time that I have been working as a conductor. 1530

Q. Whether or not it was on some other line operated by the Southern Railway or whether it was on the lines operated by—whether or not it was on some subsidiary corporation or other company associated with the Southern Railway, or whether it was the Southern Railway Company proper; is that not correct?

A. The rules are basically identical.

Mr. Barnwell: I object, your Honor. It seems to me this man worked for an entirely different railroad so far as the contract is concerned; under an entirely different contract so far as the contract is concerned. If the same provisions apply, I submit, he should produce his contracts so as to show he could testify to the same thing. 1531

The Court: His answer was that they were basically identical. The natural inference is that there was some difference between them. Otherwise he wouldn't use the word "basically".

By Mr. Willmarth: 1532

Q. Was the same pay rule involved identically?

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1533 A. Article 5(a) on the Southern Railway schedule is identical to the article in 5(a) and (b) in the C. & O. T. P. schedule. Article 6 is identical.

Q. What about Article 7?

A. Article 7 is identical.

Q. Generally speaking, is it in your knowledge and experience how long the industrial tracks have been in which local freight crews have switched along the lines as part of their regular assignment?

1534 A. On the division that I am personally familiar with, the industrial tracks at stations and along the line of road vary, say, between 200, twelve or fourteen hundred feet long.

Mr. Willmarth: That is all.

Re-cross Examination

By Mr. Barnwell:

Q. Are you familiar with Waterbury Dam track?

A. No, sir.

Q. Isn't that on the C. & O. T. P.?

A. It is not on the division I worked on.

1535

Q. But it is on that railroad?

A. Yes, sir.

Q. Do you know that is eight miles long?

A. Yes, sir; I have the information it is.

Q. That is an industrial track?

A. I wouldn't so hold.

Q. But it is so regarded and it is handled as such as a matter of fact?

A. No. We have had crews assigned to that branch between Spring City and Waterbury Dam.

1536

Q. Isn't that an industrial switch switched by the local freight?

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A. Local freight crews have made trips to Waterbury Dam. 1527

Q. As a part of their regular assignment?

A. And made claims for additional mileage.

Q. But none of them have ever been paid, have they?

A. Yes; my information is that it was paid.

Q. But that was for additional mileage—not for additional day? 1528

A. That is correct.

Q. You are not familiar with that operation that Mr. Harrison testified to yesterday on what he called the Atlanta Armory Depot—said it was two miles, I think? 1529

A. I am not personally familiar with the operation. I had some claims in the files when I assumed this office for additional day's pay.

Q. He said they had never gotten any extra pay for that, I think that was his testimony.

A. I think that is correct.

Q. On all of these regular pay tickets, overtime where claimed was paid, was it not? I say, on all of these regular tickets that are put in, where overtime was claimed it was paid—those have all been paid? 1530

A. You are speaking about the Charleston-Branchville runs?

Q. Yes, sir; the cases we are trying.

A. I couldn't answer as to that, Mr. Barnwell, as to whether the tickets were paid as claimed on the regular ticket or not. I assume they were.

Q. You have no reason to believe they were not?

A. That is right.

Q. But in making this claim there was no allowance made for that overtime, was there? Your suit here doesn't make allowance for the fact that they have been paid for that overtime, does it? You are claiming 1531

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1541 straight overtime one day, aren't you, regardless of overtime?

A. We are claiming the additional day's service.

Q. In addition to the overtime which they have already been paid—that is your claim as set out in your complaint?

A. No. I wouldn't say we were claiming that in addition to the day's pay and overtime.

Q. Isn't that what your complaint here says?

1542 A. The general practice and policy is to deduct overtime.

Q. One minute. Didn't you testify that when all these settlements affected only the claims that they were settled? Isn't that your testimony in response to Mr. Willmarth's question? In other words, for the benefit of both sides, you settle with the understanding that that shall not be a precedent, it shall not set up any precedent either for anything that has happened or shall happen to settlement of the matters immediately being considered—isn't that the established practice in the settlement?

1543 A. That would cover the specific case that was disposed of.

Q. And that is the regular practice with reference to all of such cases?

A. But it wouldn't apply to other complaints that were not disposed of by agreement.

Q. But what I mean is, Mr. Lawrence has testified that on this run which was in evidence, it was agreed that it should not be a precedent?

A. That was the Emco settlement.

1544 Q. And he said that was generally the way the matter was settled?

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1545

A. Without applying to any other contention or claim on the system. It applied only—

Q. In other words, it should not be used as the basis of anything else—that was settlement of that claim?

A. That is right.

Mr. Barnwell: That is all.

(Witness excused.)

L. B. JOHNSON, a witness for the defendant, after being sworn, testified as follows:

1546

Direct Examination

By Mr. Willmarth:

Q. Will you give your full name, Mr. Johnson?

A. Lawton B. Johnson.

Q. Where do you reside?

A. Farmville, North Carolina.

Q. What is your occupation, Mr. Johnson?

A. General Chairman for the Brotherhood of Locomotive Firemen and Enginemen, Southern Railway System.

1547

Q. How long have you held that position?

A. I served in the capacity of acting general chairman from 1929 until 1937. And I was elected General Chairman in 1937.

Q. And have served as elected General Chairman to this day?

A. Yes, sir.

Q. So that you have actually performed the duties of General Chairman since 1929?

A. Yes, sir.

1548

Q. What did you do prior to that day?

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L. B. JOHNSON

1549 A. I was employed as an engineer. I originally came from the Seaboard Railroad and I was employed as a fireman on the Columbia Division of the Southern Railroad. And I worked in that capacity, as a fireman, until 1919. And I was promoted to engineer in 1920.

Q. As a General Chairman for the Brotherhood of Locomotive Firemen and Enginemen, have you had certain claims referred to you by the men whom you represent for an additional day for making a side trip?

A. Yes, sir.

Q. Where is that side trip located?

1550 A. Calvin and Bundy in Virginia.

Q. Will you describe it?

A. Calvin and Bundy is a distance of about two miles and formerly there was an engine worked there by a mine and they cut that engine off and extended the Southern Railway's jurisdiction down through the mine.

Q. And between what points do the crews operate on their assigned runs?

46 A. Appalachia to St. Charles.

1551 Q. In what states?

A. In Virginia.

Q. Are those local freight crews?

A. Yes, sir.

Q. What is the intermediate point or where they turn off?

A. My recollection is that they make turnaround service from Appalachia to St. Charles.

Q. And where do they turn off at the intermediate point?

A. It is either—I think it is Bundy.

1552 Q. And those claims are presently pending and being processed by you?

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A. Yes, sir.

Q. What do you mean by the term "side trip"?

A. A side trip, as I see it, comes under the provisions of Article 5 of the schedule.

Q. And to what do you refer when you use the term?

A. It is either a turn with a turn, a turn in connection with a straightaway trip.

Q. And in making this side trip does the man operate on the main line over which his schedule run is or does he operate off the line?

A. He operates on to an adjacent track, or track leading from the main line.

Q. What is the difference between going off the line on a side trip and going off the line to some industry located right along the line?

A. The difference, as I understand it, it is not in connection with his assignment.

Q. That is, is or is not switching operations at the industries located at the stations right along his line considered part of his duty?

A. Yes.

Q. Is there any limit where you can distinguish in the two?

A. I don't know of a limit. I think as long as industrial tracks is in connection with or adjacent with the railroad, the main line, that is permissible. But when they go off a distance, that is another thing.

Q. Do you know of any situation in your experience on the Southern Railway where it has been considered that men should be required as a part of their assigned run to make a trip off to an industry five or six or seven miles?

A. None whatever until this case arose.

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1557 Q. And when such cases have arisen and come to your attention, have you advised that there has been—

Mr. Barnwell: I object. Let the witness testify, please.

The Court: Do that, Mr. Willmarth.

By Mr. Willmarth:

Q. Have you or have you not advised the carrier that it was violating schedule rules?

A. I am handling the claims at Bundy.

1558 Q. Do you recall any other claims that you have handled for side trip operations, Mr. Johnson?

A. That is the only case that I have handled; as I recall.

Q. Do you have knowledge of other claims having been made by your men?

A. Have not.

Cross Examination

By Mr. Barnwell:

1559 Q. Mr. Johnson, as I understand, in your opinion the length of the side trip does enter into the question? Determines it in fact; is that right?

A. Well, I haven't—I know of no side trip, Mr. Barnwell, that has been the length in this case. I think that it would come within the rule, Article 5—that is, a trip of the type which we are discussing here.

Q. In other words, your idea is that the length of a switching movement would determine whether it was a switching movement or a side trip; is that right?

A. If it was not adjacent to the main line.

1560 Q. It doesn't make any difference how long it is if it is adjacent to the main line; is that right?

A. I know of no case, Mr. Barnwell, where the tracks have extended the length that these have.

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Q. Exactly. But you do know of cases where they are very long, don't you? 1561

A. Well, I don't recall any at this time.

Q. You are familiar with the Beach Island spur at Langley?

A. Well, I have heard of it.

Q. That is an industrial track, isn't it?

A. I presume it is.

Q. That is over two miles long, isn't it?

A. I don't know the distance, Mr. Barnwell.

Q. How about the one at Bath, South Carolina, operating to the Dixie Clay Company, are you familiar with that? 1562

A. No, sir.

Q. That is an industrial track, isn't it?

A. That has probably been built since I operated over there.

Q. The fact that it is a mile or nearly two miles or a mile and a half long, would that change its status?

A. Well, I would think so.

Q. You would think so. In other words, according to your opinion, the length of the industrial track is what determines whether it is a side trip or not? 1563

A. I think the track should be within the bounds of the main line, a reasonable distance.

Q. Where does it start and where does it finish?

A. I know of no tracks, ordinarily speaking—

Q. Suppose it was five miles?

A. I think that would come within a turn within a turn.

Q. How about three miles?

A. Well, my answer in that case would be exactly in the case of the two miles. I am handling one; as I understand, the Bundy case is two miles. 1564

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L. B. JOHNSON

W. D. JOHNSON

1565

Q. That is two miles?

A. That is what I understand; that is, my files show that.

Q. You have got the same dispute there that we have here; is that right?

A. Yes, sir.

Q. And it is not recognized by the railroad?

A. That is right.

(Witness excused.)

1566

W. D. JOHNSON, a witness for the defendant, after being sworn, testified as follows:

Direct Examination

By Mr. Willmarth:

Q. Will you state your full name, Mr. Johnson?

A. W. D. Johnson.

Q. Where do you reside, Mr. Johnson?

A. Washington, D. C.

Q. What is your occupation?

1567

A. I am vice-president and national legislative representative of the Order of Railway Conductors.

Q. And what was your occupation prior to that?

A. I was a conductor on the Gulf, Colorado, and Santa Fe Road.

Q. How long did you operate as a conductor?

1568

A. I started railroading as a brakeman out of Brookfield, Missouri, on the 18th day of October, 1898. I worked on two or three railroads, but on the 11th day of April, 1904, I hired out as a conductor on the Gulf, Colorado and Santa Fe, and I was in continuous service as such from that date until August 1, 1931, at which time I was granted a leave of absence to take

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over the duties of the office which I now hold. During my service as a conductor on the Santa Fe I served as a through freight conductor, work train conductor, local conductor, passenger conductor, and as a yard-master.

Q. In connection with your duties as Vice-President of the Order of Railway Conductors, have you had frequent occasion to make reference to the schedule rules in force for conductors on various railroads throughout the United States?

A. I have; principally, however, in the Southern territory and in the Eastern territory.

Q. And are you testifying from your experience both as an operating man or operating conductor and from your experience gained as an officer of the Order of Railway Conductors in handling various schedule negotiations and disputes arising on various railroads in the United States?

A. I am.

Q. Generally, is it or is it not true that the pay rules governing conductors on Class 1 railroads of the United States are identical to those here involved in this suit? That is, I am referring specifically to Rule 5(a).

A. They are looked upon more or less on all Class 1 railroads as what we term standard rules, and they read practically the same on all Class 1 roads.

Q. Is it or is it not true that the particular Rule 5(a) is identical in the schedules of the majority of Class 1 railroads on which you are the conductors' representative?

A. I would say a very vast majority.

Q. And it would be the exception rather than the rule if there was a difference in that pay rate?

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A. That is right.

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Q. And how long would you say that pay rule had been the pay rule governing the pay of conductors on railroads of the United States?

A. Well, I am safe in saying it dates back to the time of federal control because it was at that time that we got the eight-hour day or the eight-hour rule. That would date back to about 1918.

Q. What would you say as to whether controversies have arisen as to side trips on other railroads?

A. There has been such controversies.

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Q. In other words, this controversy as to a particular side trip is not necessarily new, is it?

A. No.

Q. How would you or what does the term "side trip" mean to you?

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A. If I may make this observation, back in the early days of railroading, my experience covers a good many years, we looked upon any service aside from our regular assignment as extra service. It made no difference whether it went back, forward, to the right or to the left. It was aside from our regular assignment. And pay adjustments were made accordingly, in most instances. However—

The Court: That applied to local freights, too?

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The Witness: Yes, sir. In all classes of service; even in passenger service when called upon to perform extra service over and above that outlined in the regular assignment covered by the conductor. He received extra compensation; gauged on the service that he performed as provided in the rules in the working agreement covering extra service for crews. Now, I think we'll find that if we check back, it is only, we might say, I think since the setting up of the National Rail-

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road Adjustment Board that the terms "lapback" and "side trips" and "turns within turns" have become more prominent in mentioning claims, either sustained or denied, than we had prior to that time. But they mean the same. I think they are all more or less synonymous because it is requiring the crew to perform service over and above that which he bid in when he bid on the assignment.

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Q. How does he tell what he bid in, Mr. Johnson?

A. Well, he is gauged by the bulletin. They vary a little bit on the various railroads but not too much, however; particularly so in local service. It sets a time for him to leave his terminal. It will say whether it will be daily or tri-weekly or for the calendar working days of the month with a Sunday layover at whatever the point may be designated in the notice. And it will say that he will perform all local service and switching at all points, all stations from the point he starts out of to the point where he ties up; vice versa; the next day returning from his tie-up point or his outlying point back to his home terminal. They mean by that he will handle l. c. l. freight—that is, less than carload freight—either into or out of his local cars; he will pick up cars en route, classify them in some instances; set them out at fill out points, or designated points, to be picked up by through freight crews or crews that are required to fill out and move them on into the terminal. In other words, he does all of the work between the points which he is assigned. And unless there is something special for him to do he is more or less under the jurisdiction of the agent at the stations along the line. Of course if there are blind sidings, then he is the agent at that place, handling the through messages or special instructions.

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1579

Q

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Q. As I understand you, that is his assigned job?

A. That is right.

Q. How does he know when he has been called upon to perform some service not included within his assigned job and not paid for under that assignment?

A. Because that would be through special instructions from the proper authority to do that work over and above his assignment.

Q. Suppose they instruct him to back up five miles?

A. He'd arrange to set out his train and take his engine and back up that five miles and do what he was instructed to do by the proper authority?

Q. Would that be part of his job?

A. No, sir. That would be over and above his assignment and claim would be made accordingly.

Q. Under what rule?

A. Under the basic day rule.

Q. Is that true for every railroad in the country in the absence of some rule which limits or has changed it in some way?

A. Absolutely.

Q. Has been true since the time of World War I?

A. Absolutely.

Q. Suppose he is required to go on beyond his terminal five miles; is that part of his job?

A. No, sir.

Q. Then if he makes overtime does that compensate him for that time on beyond the terminal?

A. No, indeed.

Q. Is that true for every railroad in the country?

A. I'd say yes.

Q. In the absence of some particular one where the committee has made some particular special rule covering some special point, that is true, isn't it?

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A. That is right. He is assigned from A to B. When he arrived to B he arrives at the extreme end of his assignment. If he is called to go beyond, he is called for additional service and he starts a new day. 1586

Q. What is the difference between going to an industry right along the line and a track that runs off to an industry up five or six miles up the line?

A. There is no difference whatsoever from the standpoint of pay. It is extra service over and above his regular assignment.

Q. I am asking you to determine for me how the man can tell when he should claim extra pay. He is running to an industry in each instance? 1588

A. That is right.

Q. What is the difference?

A. But if he is running to an industry that is outside of his assignment and requires special instructions to cover that portion of the track—

Q. How does he know it is outside of his assignment?

A. He gets a message to go out there.

Q. Is that the only way he can tell?

A. If he knows—if a man is going out beyond the confines of his straightaway assignment, then he knows that that is over and above and then is when he claims time for it. 1587

Q. How does he tell when he has got out beyond the confines of his ordinary assignment?

A. Well, in practical railroading, Mr. Willmarth, when industry tracks, spur tracks, or anything else that you want to call them—they are rails over which train and engine service earn their money—now, when they go out beyond a reasonable distance, say 15 or 20 or 25 or 30 car lengths, then you are getting beyond 1588

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1589 what is recognized on practically every railroad in this country as an industry track.

Q. An industry track?

A. Yes.

Q. Getting beyond an industry track?

A. Yes; that is outside of those things.

Q. Does the bulletin have anything to do with determining his assignment and what is outside of it?

A. Absolutely; it has everything to do with it.

Q. What?

1590 A. Everything with his program of work. It says that he will do all station switching. Loading and unloading of freight, picking up of cars, spotting cars at all stations en route. And if it didn't provide that, he'd go off down here to Jones' Mill or some other outlying industry. He is not going to make that trip because it is not a part of his assignment, and if he is required to go there, then he is rendering additional service. It isn't a question of switching the Ancor plant. It is getting him to the Ancor plant. And that is what that man did. He run over approximately six
1591 miles of railroad; the same kind of railroad that he left, to get to this plant and then he did his switching or spotted his cars down there. And he only went down there under special instructions, from one who was authorized to give him instructions, not the station agent. And those bulletins protect the management just as much as they protect the men.

Q. In what respect?

1592 A. Because it outlines the work that that man will do and avoids him claiming extra time for work that is provided in the bulletin. That is the reason they bulletin them. It is not all one-sided. It works both ways.

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Q. So that the management will know exactly what to expect from that man for the pay they are giving him? 1593

A. That is right. And if there is a claim made for an arbitrary or a special allowance, then the management is in a position to say, "Why, that work is incorporated in the bulletin posted covering the run that you bid in." If they didn't have that, why we would have a chaotic condition. I don't know what we would have.

Q. If this man is instructed to go out off on a line that switches off of his assigned run to a mile post and come back to his assigned run—does no switching whatever out there—would he make claim? 1594

A. Absolutely.

Q. Why?

A. Because he was required to make a run over and above his assignment; off of his assignment.

Q. Has this system of paying train service men engaged in the actual operation of the trains been called a piece-work system?

A. Well, in a sense, yes.

The Court: I think we'll have to stop. We'll come back at five minutes after three. 1595

(Recess until 3:05 p. m.)

Afternoon Session

(The trial was continued.)

W. D. JOHNSON resumed the witness stand and testified further, as follows:

Direct Examination

By Mr. Willmarth: (Continued).

Q. Mr. Johnson, I think this morning in your direct examination you stated that from time to time you 1596

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1597 had participated in settlement of negotiations in reference to disputes arising under contracts in the various railroads?

A. That is right.

Q. Did you participate in a negotiation toward settlement with the Southern Railway of the claims here in dispute?

A. I did.

Q. Just describe what was said and done and when.

1598 A. I think it was on or about April 22 or 23 of this year that Mr. Raynes and I met with Mr. Mackey. I think Mr. Travis and perhaps Mr. McGill sat in on that conference, and we discussed quite thoroughly this particular controversy. I suggested to Mr. Mackey at that time that he withdraw the suit and allow the case to go before the National Adjustment Board for consideration and determination, and whatever decision they rendered we'd accept and that would close the particular case. And he declined to do that and then I suggested to him that we endeavor to reach a memorandum of understanding providing some reasonable compensation for the service involved and dispose of the matter and withdraw the case. And we were at that time perfectly willing to try to dispose of our differences to the end of working out an agreement to cover the service involved, but unfortunately, Mr. Mackey did not see fit to comply with our request.

Q. Is not that true at any time in reference to a dispute in cases arising under the collective contract, Mr. Johnson?

A. I didn't quite get that.

1600 Q. You were at that time willing. I said, is not that true at any time? Are you not open for negotiation in an effort to reach a reasonable agreement?

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A. That is right. It is far better to dispose of these controversies across the table. And we don't relish submitting them to the Board. We prefer settling through process of negotiation across the table. 1001

Mr. Barnwell: Your Honor, I don't know what light that throws on the matter but it seems to me that is clearly irrelevant as to negotiations looking to a settlement pending the litigation. I move to strike it out.

The Court: It throws no light on the issue at all. It is a statement by him.

Mr. Barnwell: For the sake of the record—if your Honor will overrule it, it is all right—I would like to strike it out. 1002

The Court: I think we'll leave it in. I don't know that it does any harm one way or the other. It certainly doesn't throw any light on the issue. I know I and everyone else would like to see people agree before they come to court.

Cross Examination

By Mr. Barnwell:

Q. I think in your direct testimony you stated the duties under local freight service were generally recognized—I mean, switching and moving the cars to various places, and all of that. You testified to that in the opening, did you not? 1003

A. That is right.

Q. And when you speak of local freight service, that includes industry switching, switching in stations, whatever may be required for handling the cars along the train?

A. That is right.

Q. Along the route. You also heard Mr. Keister testify about this bulletin that is in evidence as De- 1004

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1005 fendant's Exhibit "J". Mr. Keister testified that that was in the usual and customary form always used on the Southern Railway. There is nothing wrong with that bulletin, is there?

A. Colonel, I'll be glad to observe the bulletin, but I don't believe I was in the room yesterday morning. I got in yesterday morning. We were late and Mr. Keister had just about completed his testimony. However, I'll be glad to read this.

1000 Q. Taking my statement to you, that that was Mr. Keister's testimony, that this bulletin is in the usual and general form used over the whole system of the Southern Railway System and including Southern Railway Company?

A. I wouldn't contradict that.

Q. I mean, there is nothing wrong with the bulletin?

A. It says: "Effective Monday, June 12, 1944, all local freight service between Charleston and Columbia will be discontinued, and the following local freight service inaugurated:

1007 "No. 60 leave Andrews Yard Mondays, Wednesdays, Fridays, at 7:00 a. m. Camp at Branchville, and come on duty at Branchville at 10:30 A.M., on Tuesdays, Thursdays and Saturdays as local west to Andrews Yard.

"No. 61 leave Charleston on Tuesdays, Thursdays and Saturdays at 7:45 A.M. Camp at Branchville. Come on duty at Branchville at 10:30 A.M., on Wednesdays, Fridays and Mondays. Run local east to Charleston.

1000 "These changes create vacancies, effective Monday, June 12, 1944, for the following:

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"1 Conductor, 1 Flagman and 1 Brakeman, local freight service between Andrews Yard and Branchville, with Sunday layover Andrews Yard. 1609

"1 Conductor, 1 Flagman and 1 Brakeman, local freight service between Branchville and Charleston, with Sunday layover at Branchville.

"Qualified applicants desiring these positions will file written application with the undersigned not later than midnight Friday, June 9, 1944, which is end of the bulletin period." And it is signed by Mr. Graham, Trainmaster. That is in keeping with the bulletins we find, and clearly outlines that this is local service on a straightaway basis, between Charleston and Branchville, Branchville and Columbia. Nothing said about any side trips or anything of the kind. And it is recognized as a bulletin for straightaway service. 1610

Q. Which would include industrial switching, spur tracks and everything of that sort?

A. Industries that are classified and recognized as industries adjacent to the straightaway movement.

Q. That is your construction of an industry track? 1611

A. Well, it is. I think it is pretty sound, Colonel.

Q. Are you familiar with the negotiations between the conductors and the major railroads looking to changes and amendments to the contracts in existence that were had in 1946?

A. You mean the Southern Railway? 1612

Q. No, sir. The negotiations between the conductors and the major railroads—including Southern Railway, yes, sir—looking to changes and amendments to the contracts in existence in 1946?

A. I know about that, yes; but I did not participate in any of those negotiations.

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1613

Q. Did you not—that is, the Order of Railway Conductors and the organizations—propose this as an amendment: “Crews in any class of road service required to make a lapback trip, side trip, or double hills shall be paid not less than the minimum day at the rates applicable for each trip or double, in addition to all other time earned on the day or trip without deductions therefrom.” That was the proposal made by the conductors and others as an amendment to the existing contract; that is correct?

1614

A. That is right. That was in the proposal of July, 1945, and I understand is incorporated in the proposal that is now before the management.

Q. That has been proposed again?

A. Yes. They are revising those. The moratorium run out.

Q. How does it happen, then, that the conductors made such proposal if, as you testify, the present Article 5(a) covered that situation?

1615

A. Because we wanted to get something definite in the contract that would eliminate all future controversies, due to the fact that some of the railroads were attempting to abuse the basic day rule, straightaway assignment and turnaround assignment. We wanted something definite regardless of where they went; when they made the trip, they would be paid according to the provisions.

Q. But you recognized that it wasn't covered by the present contract; isn't that the effect?

A. No. We have never given that up. We say that it is covered by the present working agreement and that is the reason we are here today.

1616

Q. But you mean the proposal—the conductors made that proposal?

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A. We wanted the proposal.

Q. It is your proposal, not the railroad's?

1617

A. I know, but they came back with something, too.

Q. You renewed that same proposal?

A. I don't think there has been any change in that proposal. Perhaps Mr. Nimitz is better qualified to answer that because he has participated in some of those recently. But we wanted a definite stipulation in the agreement, so far as payment is concerned, covering all of those extra trips required.

Q. That is what you are proposing now? I mean, it is under negotiation at the present time. At least, it has been proposed again recently by the conductors?

1618

A. You mean in our proposal of 1947?

Q. Yes, sir.

A. That is right. It is a general revision of our rules.

Q. Without undertaking to go over the history of the development of 5(a), 6 and 7—you were here when Mr. Cox testified as to the historical development of those rules, how they started and all of that?

A. I was not, Colonel. That was yesterday morning. Mr. Cox, I think, started the evening before and then—

1619

Q. Well, in the course of that testimony, Mr. Cox read into the record this extract from the memorandum of understanding issued December 17, 1919—you are familiar with that memorandum of understanding?

A. I know a little something about Supplements 15 and 16 and 24 and 25 to General Order 27.

Q. In which the Director General made this as a proposal: "It seems to me that the best way to accomplish the giving of reasonable additional compensation to the employees in this slower freight service, so as

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1621 to remove the unjust discrimination which in a broad and general way it seems to me exists between them and the employees in this faster freight service is on the one hand to allow time and one-half for overtime, and on the other hand to cut out in all freight service all special arbitraries and allowances of every character, including initial terminal delays and final terminal delays. I believe these steps will substantially correct the inequalities which now exist and will put the compensation for freight train service upon a much fairer basis than now exists.

1622 "I am therefore willing to establish December 1, 1919, the time and one-half for overtime in road freight service provided the train and enginemen will accept such a basis in lieu of all special allowances and arbitraries of every character and will do this for the railroads as a whole." That was the proposal of the Director General. That was accepted, wasn't it?

A. Yes. And we lived under that for a long period of time. But, Colonel, that only meant the arbitraries that were being paid on the date that that order was issued; not into the future, or to take care of something that might be inaugurated on the part of the railroads twenty years hence. True, we gave up outbound delay; we gave up a certain amount of inbound delay. We gave up special allowances for doing a certain amount of train work on the road. We gave all that up.

Q. And the Director General granted the overtime ruling granting time and a half in lieu of and upon the cancellation of all prior existing arbitraries, wage payments, for service performed during the regular trip; isn't that correct?

1624 A. That is right. So far as arbitraries were in effect at that time. But it was not with the intent that

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all future arbitraries, and regardless of what kind of service that the railroad might inaugurate at some future time, that you do that for nothing.

Q. And that had to be negotiated?

A. Yes, sir. And we have been negotiating since, and many, many, many, many special agreements have been entered into on the various railroads. I negotiated some just recently under Baltimore & Ohio Railroad covering service somewhat similar to this.

Mr. Barnwell: That is all.

(Witness excused.)

FRED H. NEMITZ, a witness for the defendant, after being sworn, testified as follows:

Direct Examination

By Mr. Willmarth:

Q. Will you state your full name for the record, Mr. Nemitz?

A. Fred H. Nemitz; N-e-m-i-t-z.

Q. Where do you reside, Mr. Nemitz?

A. Cedar Rapids, Iowa.

Q. What is your occupation?

A. Senior Vice-President, Order of Railway Conductors.

Q. How long have you held that position, Mr. Nemitz?

A. I have held the position of Senior Vice-President since August 1, 1941; Vice-President since 1920.

Q. Prior to that time what was your occupation?

A. Well, I started out as a laborer and worked some in the shops, on the track, coal sheds, various railroads, various parts of the country; worked as a switchman,

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1629 as a brakeman, as a conductor. Entered the service on the Southern Pacific in 1903 at Tucson, Arizona. Remained there fourteen years as a brakeman and as a conductor. I served while there as local chairman for the Order of Railway Conductors, as vice-chairman of the General Committee and then as chairman of the General Committee, referred to usually as General Chairman. Then in 1920, I was appointed as a vice-president for the Order of Railway Conductors. Served in that capacity up to August, 1941, and since then as senior vice-president.

1630 Q. Did you serve on some of the boards of adjustment which preceded the present board created by the 1934 amendments to the Railway Labor Act?

A. Yes, sir. I served on the Western Train Service Board at Chicago about two and a half years; on the Southwestern Train Service Board at St. Louis about nine months. I also served up in Kansas one time, and temporarily on the present Train Service Board of Adjustment during the vacation of one of our vice-presidents.

1631 Q. And have you in the course of your experience participated in a number of negotiations concerning the rules involved in the conductors' contract?

A. Yes; many of them.

Q. There has been reference made here to a proposal made by the Order of Railway Conductors—and I assume the other train service organizations—to the carriers with reference to a provision covering side trips, lapbacks, and similar work. What was the purpose of proposing a provision of that kind to be incorporated, Mr. Nemitz?

1632 A. Principally to prevent controversies such as we have right here. Some of the railroads raised no ques-

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tion about paying for side trips or lapback trips or trips beyond the end of the run, or short trips before starting the assignment. They pay those without question. Hundreds of them have been decided upon various tribunals upon which I served. Some of the railroads, however, take the position that the rules don't require that, just as this carrier is taking it before this Court here. And we don't agree with them, of course, and in order to prevent these expensive controversies from coming up from time to time, first one place and then possibly another, the rule was submitted so as to make it so clear that even this railroad, and all others that take similar position, couldn't raise that kind of a question. 1633 1634

Q. When you speak of side trips, what do you mean by the use of that term, Mr. Nemitz?

A. I may illustrate that this way. Let's say I was assigned from Charleston to Branchville—or let's put it this way: from Charleston to Columbia. And when I arrived at Branchville I was required to make a trip from Branchville five or six miles out on the line toward Augusta, either to get one car or a hundred cars, or just going out there to take the Superintendent out there to let him look around. That would be a side trip. 1635

Q. Would it or would it not be a new trip in addition to your regular trip?

A. It would be a new trip. Usually referred to here as a side trip. The minimum allowance under the schedule that could be made to any conductor for performing that side trip would be a hundred miles. If he was nine hours making it, he would receive 100 miles and one hour overtime. 1636

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1637 Q. If, just for illustration, he were able to cover his regular assignment in three hours' time but it took him nine hours to cover this side trip operation; what would your claim be?

A. The distance being 128 miles from Charleston to Columbia, he would receive 128 miles at the local freight rate if he was in local freight service for that trip, and he would receive 100 miles for the side trip out from Branchville out that five or six miles and back and one hour overtime at time and a half.

1638 Q. If he made that 128 miles in twelve hours, excluding the side trip, what would he be paid?

A. Well, the running time for 128 miles is ten hours fourteen minutes. Any time he worked in excess of ten hours fourteen minutes he would receive overtime at time and one-half. It would be 128 miles at local rates for the trip, plus overtime after ten hours and fourteen minutes. If it was twelve hours, would deduct ten hours and fourteen minutes from twelve hours, and whatever that result is, that would be the amount of overtime he would receive at time and one-half.

1639 Q. And if in addition to that trip he made a side trip which took an additional two hours, what overtime would you turn in?

A. If he made a side trip in two hours and he was twelve hours making this trip?

Q. That is correct.

1640 A. You would deduct the two hours time that he was making this side trip from the total time on duty. And he would get no overtime under the example that you cite there, because he would be required to work ten hours and fourteen minutes on the 128 miles, as I understand it, and he was two hours in making the side trip. So if he was twelve hours and fourteen minutes

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in the combined service he would receive no overtime. He would receive 128 miles for the straightaway trip and 100 miles for the side trip, both at the local rates if he was in the local freight service on both trips.

1641

Q. And if over-time had been included in his claim, would it be the usual custom and practice to deduct it from the 100 miles which he received?

A. The only time that is deducted is the actual time consumed in making the side trip from the total time on duty, from the time he reports until he is relieved from duty at the end of his run.

Q. Why is it deducted?

1642

A. Because the side trip is a separate trip, a trip separated from his regular assignment.

Q. And a trip which under my illustration did not include overtime?

A. That is right.

Q. When this side trip is made does it make any difference whether it is made to a station up on the divergent line or whether it is made to an industry at the end of the divergent line?

A. No difference whatever.

1643

Q. State the difference, if any, that it would make as to whether in going off on the side trip he switched three cars or ten cars or twenty cars.

A. None whatever. It would be paid the same if he went up there with just the engine.

Q. Rule 5(a), or any rule, take into account the number of cars that are pushed or pulled or switched?

A. None. We receive no more for handling a hundred cars in a train, or on a trip or on a side trip, than we would if we were moving ten or one or none.

1644

Q. Some reference has been made to the memorandum of understanding issued by the Director General,

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1645 I believe in 1919, with reference to abolishment of arbitraries. Will you explain and interpret that memorandum and what was meant under it?

1646 A. The arbitraries existing at that time, usually between terminals, were eliminated and in lieu thereof time and one-half was granted. The arbitrary payment such as for switching at the initial and final terminal was continued. Arbitraries such as for fueling the engine, for closing ventilators and regulating the ventilators, were continued. Arbitraries in passenger service were continued. And the only arbitraries discontinued were those other than those to which I have just referred. And, generally, for a work train service such as running out to the point where the work train service was to begin, the arbitrary payment for that purpose was discontinued. But, in substance, that is about all of them.

Q. Since that time have or have not a number of railroads by negotiation renewed in their schedules various arbitraries or provisions of that nature?

1647 A. They have. Arbitraries, special allowances have been negotiated on various railroads for various kinds of services subsequent to that time. I might add too, that there isn't anything in that arbitrary provision read by Mr. Barnwell, or that he referred to, that says that these arbitraries or special allowances for special services might not be negotiated or might not be again re-established. I believe in one instance it goes on so far as to state that if some of these, such as the call time rules, that if the initial service were abused and the trains were delayed so as to cause an initial delay, that negotiation should be held to re-establish them, 1648 notwithstanding the payment of time and one-half.

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Q. Was there anything in that memorandum that affected the pay rule in the schedule, Rule 5(a), with reference to the pay conductors should receive for a trip? 1849

A. No, sir.

Q. Was it intended or directed toward that end?

A. I don't know as I understand you.

Mr. Willmarth: Strike that.

Q. As I have understood what you have said—or correct me if I am mistaken—the memorandum was directed to eliminating certain pay you had received for certain special services and was not directed to your pay rules with reference to the runs? 1850

A. That is right.

Mr. Barnwell: Ask the question, please, Mr. Willmarth.

Mr. Willmarth: I'm sure I can't guide this witness, Mr. Barnwell.

The Court: You are rather talking things into the record, Mr. Willmarth.

Q. What effect, if any, Mr. Nemitz, did the memorandum issued by the Director General in 1919, have on this schedule agreement, Exhibit 12, with reference to side trips? 1851

A. None.

Q. What rule in your opinion entitles the conductor to pay for side trips?

A. Basic day rule, 100 miles or less, eight hours or less, constitutes a day's work.

Q. There has been some testimony here, or reference made, to the fact that certain special agreements with reference to additional pay for side trips made on the Southern were made under stipulation that they should 1852

Southern Rwy. Co. v. Order of Rwy. Con. of America

FRED H. NEMITZ

1653 cover only that instance. Is or is not that customary with reference to special agreements?

A. Usually those agreements only cover the specific instance for which they were negotiated to cover. Other rules that apply generally on the system are referred to as general rules and apply to the conditions generally over the entire railroad, or else over all the railroads.

Q. What is the reason for the limiting language with reference to its not being a precedent with reference to another situation?

1654 A. Because the situation in other places may be somewhat different and it wouldn't fit that particular condition. Take, for example, if on this particular piece of track, six and a third miles, or whatever it is out from Pregnall, we negotiated a particular agreement to govern in that particular case. Now then, we found some other place where maybe the mileage was greater than at Pregnall and might be a different kind of a service to be rendered. The agreement in the Pregnall case wouldn't fit the other condition, and for
1655 that reason we say that it would not establish a precedent and would apply only in this particular case.

Q. If you negotiated a special agreement with reference to the Pregnall case, would you be changing the rate of pay heretofore allowed under schedule, Exhibit 12?

A. No, sir.

Q. Would you be changing, then, the amount of compensation?

A. Yes, sir.

1656 Q. And that would be or would it not be the purpose of making the special agreement?

Appeal from Charleston County

FRED H. NEMITZ

A. That is right. Change the earnings of the men on the job; the conductors in this particular case.

1657

Q. As to what they should receive for making that trip from Pregnall to the industry and back?

A. That is correct.

Mr. Barnwell: No questions, sir. Thank you very much.

(Witness excused.)

Mr. Horlbeck: We wanted to offer Timetables No. 77 and 80. Our Timetable in the course of discussion disappeared. Have you any objection to our putting yours in?

1659

Mr. Barnwell: Not at all.

(Timetable No. 80 was received in evidence and marked Defendant's Exhibit "R".)

Mr. Horlbeck: As Defendant's Exhibit "S", it is agreed our friend will put in No. 77.

(Timetable No. 77, to be furnished at a later date, was received in evidence as Defendant's Exhibit "S".)

Mr. Horlbeck: Then we come back to formally offer in evidence what is marked Defendant's Exhibit "E" for identification, which was the certification by the Secretary of the National Railroad Adjustment Board, First Division, of the submission and documents and papers pending before it.

1660

Mr. Barnwell: We object.

Mr. Horlbeck: That brings back the same question, your Honor. We are just doing that for the record.

The Court: Under the rules, that is no defense.

Mr. Horlbeck: Your Honor has ruled that on a motion to amend.

The Court: The meaning of that ruling was that was no defense under the Supreme Court of South Carolina.

1660

Southern Rwy. Co. v. Order of Rwy. Con. of America

1961 Mr. Horlbeck: We would like to have it marked for identification so that it would be subject to any question of appeal and could be identified. It is already marked for identification.

The Court: I am not going to let it in. In other words, the record will show it, if this case ever goes to the Supreme Court of the United States, which it may do for all we know.

Mr. Horlbeck: It will show that this is excluded, but it is marked for identification so that it could go in the record for that court to pass upon.

1962 The Court: All right. It is not in the record.

Mr. Horlbeck: And in like manner, Defendant's Exhibit "F", which was the certification as to their docket.

Mr. Barnwell: We object to that. That is merely an affidavit which undertakes to make statements, one of which is admitted to be incorrect.

Mr. Willmarth: It will be conceded.

Mr. Horlbeck: We just desire to note preservation of our exception.

1963 The Court: I'll have to keep it out.

Is that your case?

Mr. Horlbeck: I think, your Honor please, we rest.

Mr. Barnwell: Nothing in reply.

(Adjourned until Thursday, June 26, 1947, at 9:30 a. m., at which time the case was to be argued by counsel.)

PLAINTIFF'S EXHIBITS NOS. 1, 4, 13, 14, 15

GN Form 12-42

SOUTHERN RAILWAY SYSTEM

No. 4 Time return and delay report of Conductors and Trainmen Date 9-7

Length of Time Off duty previous to this trip (1)	FIRST WENT ON DUTY			FINALLY WENT OFF DUTY			Total Time on Duty		NAME (10)
	Place (2)	Date (3)	Time (4)	Place (5)	Date (6)	Time (7)	Hrs. (8)	Min. (9)	
0	Pregnall	9-7	11 40	Harleyville	9-7	10 00	1	20	M.K. Lloyd
✓	✓ SC	✓	✓	✓	✓	✓	✓	✓	T.M. Wimberly
✓	✓	✓	✓	✓	✓	✓	✓	✓	T.O. Crapps

REMARKS: Side Trip Pregnall to Harleyville, Alumina Plant & Return to Pregnall Continued on Trip to Branchville

DETAILS OF SERVICE

Train (12)	Engine (13)	DEPARTURE				ARRIVAL				Kind of Service (Pass., Frt., Work, Yard, Deadhead, etc.) (22)
		Station (14)	Time went on duty (15)	Called to leave (16)	Time train departed (17)	Station (18)	Arrived final yard limit (19)	Time train arrived (20)	Time went off duty (21)	
Ex	817	Pregnall	11 40	11 40	11 40	Harleyville	12 15	12 15	12 15	Local Frt
			a	a	a		PM	PM	PM	
Ex	817	Harleyville	12 30	12 30	12 30	Pregnall	1 00	1 00	1 00	
			PM	PM	PM		PM	PM	PM	

DELAYED TIME CLAIMED

	Hrs. (24)	Min. (25)	ROAD { Pro rata Time and one-half Initial Terminal Final Terminal
Total time on duty under pay	1	20	
Overtime after	8	00	
Total overtime			

Checked: _____ Approved: _____ I certify this report to be correct:
Signature M.K. Lloyd
Occupation Condr.

RAILWAY SYSTEM

Conductors and Trainmen Date 9-7 1944 Plaintiff's Exhibit 1 Form 836

DUTY Time (7)	Total Time on Duty		NAME (10)	Occupation (11)		Employee Acct. Number Assigned by Carrier. To be inserted by Cond.	For Use of Audit Office Only
	Hrs. (8)	Min. (9)					
10 00	1	20	M.K. Lloyd	Conductor	3	15371	
✓	✓	✓	T.M. Wimberly	Flagman	4	12792	
				Baggageman	6		
				Porter	7		
✓	✓	✓	T.O. Crapps	Brakeman	4	23218	
				Brakeman	4		

Harleyville, Alumina Plant & Return to Branchville

ARRIVAL				Kind of Service (Pass., Frt., Work, Yard, Deadhead, etc.) (22)	Mileage (23)
Station (18)	Arrived final yard limit (19)	Time train arrived (20)	Time went off duty (21)		
Harleyville	12 15	12 15	12 15	Local Frt	100
	PM	PM	PM		
Pregnall	1 00	1 00	1 00		
	PM	PM	PM		

TIME CLAIMED

	Hrs. (26)	Min. (27)
ROAD { Pro rata Time and one-half Initial Terminal Final Terminal		

I certify this report to be correct:
Signature M.K. Lloyd
Occupation Condr.

(FOR USE OF TIMEKEEPER ONLY)

Class	Run No.	Rate			
		Conductor	Flagman	Brakeman	Baggageman
Constructive Miles					
Straight Time Worked					
Miles Paid					
Overtime—Hours					
Cause of Overtime					
Extra—Hours					
Extra Rule					
Trips					

Southern Rwy. Co. v. Order of Rwy. Con. of America

On the same printed Form 836 and filled out in like manner as Plaintiff's Exhibit 1, are the following similar Exhibits in evidence, which are not reprinted in full because in similar form and all Exhibits are to be certified up to the Appellate Court, to wit:

- Exhibit 4, Sept. 9, 1944—M. K. Lloyd, Conductor.
Exhibit 14-A, 1944, Oct. 24—M. K. Lloyd, Conductor.
Exhibit 14-B, 1944, Oct. 26—M. K. Lloyd, Conductor.
Exhibit 14-C, 1944, Oct. 28—M. K. Lloyd, Conductor.
Exhibit 14-D, 1944, Oct. 30—M. K. Lloyd, Conductor.
Exhibit 14-E, 1944, Oct. 31—M. K. Lloyd, Conductor.
Exhibit 14-F, 1944, Nov. 4—M. K. Lloyd, Conductor.
Exhibit 14-G, 1944, Nov. 16—M. K. Lloyd, Conductor.
Exhibit 14-H, 1944, Nov. 28—M. K. Lloyd, Conductor.
Exhibit 14-I, 1944, Nov. 30—M. K. Lloyd, Conductor.
Exhibit 14-J, 1944, Dec. 4—M. K. Lloyd, Conductor.
Exhibit 14-K, 1944, Dec. 7—M. K. Lloyd, Conductor.
Exhibit 14-L, 1944, Dec. 9—M. K. Lloyd, Conductor.
Exhibit 14-L1, 1944, Dec. 14—M. K. Lloyd, Conductor.
Exhibit 14-M, 1944, Dec. 21—L. M. Dukes, Conductor.
Exhibit 14-N, 1944, Dec. 23—L. M. Dukes, Conductor.
Exhibit 14-O, 1944, Dec. 26—L. M. Dukes, Conductor.
Exhibit 14-P, 1945, Jan. 27—R. E. Bolchoz, Conductor.
Exhibit 14-Q, 1945, Feb. 27—M. K. Lloyd, Conductor.
Exhibit 14-R, 1945, Meh. 8—J. D. Pooser, Conductor.
Exhibit 14-S, 1945, Meh. 15—M. K. Lloyd, Conductor.
Exhibit 14-T, 1945, Meh. 17—M. K. Lloyd, Conductor.
Exhibit 14-U, 1945, June 7—M. S. Dewitt, Conductor.
Exhibit 14-V, 1945, June 21—M. S. Dewitt, Conductor.
Exhibit 14-W, 1945, June 23—M. S. Dewitt, Conductor.
Exhibit 14-X, 1945, June 28—M. S. Dewitt, Conductor.

Appeal from Charleston County

- Exhibit 14-Y, 1945, July 12—M. S. Dewitt, Conductor.
Exhibit 14-Z, 1944, Oct. 21—M. K. Lloyd, Conductor. 1873
Exhibit 14-AA, 1944, Nov. 2—M. K. Lloyd, Conductor.
Exhibit 14-BB, 1944, Nov. 14—M. K. Lloyd, Conductor.
Exhibit 14-CC, 1944, Dec. 2—M. K. Lloyd, Conductor.
Exhibit 14-DD, 1944, Dec. 12—M. K. Lloyd, Conductor.
Exhibit 14-EE, 1944, Dec. 28—L. M. Dukes, Conductor.
Exhibit 14-FF, 1944, Dec. 30—L. M. Dukes, Conductor.
Exhibit 14-GG, 1945, Jan. 2—L. M. Dukes, Conductor.
Exhibit 14-HH, 1945, Jan. 20—M. K. Lloyd, Conductor.
Exhibit 14-II, 1945, Feb. 22—M. K. Lloyd, Conductor. 1874
Exhibit 14-JJ, 1945, June 26—M. S. Dewitt, Conductor.
Exhibit 14-KK, 1945, July 14—M. S. Dewitt, Conductor.

SOUTHERN RAILWAY SYSTEM

No. 3

Time return and delay report of Conductors and Trainmen

Date 9/7

Length of Time Off duty previous to this trip (1)	FIRST WENT ON DUTY			FINALLY WENT OFF DUTY			Total Time on Duty		NAME (10)
	Place (2)	Date (3)	Time (4)	Place (5)	Date (6)	Time (7)	Hrs (8)	Min. (9)	
10 hours ✓	Charleston ✓	9/7 ✓	7:30 ✓	Branchville ✓	9/7 ✓	5:25 ✓	10 ✓	05 ✓	M.K. Lloyd T.M. Wimberly
✓	✓	✓	✓	✓	✓	✓	✓	✓	T.O. Crapps

REMARKS:

DETAILS OF SERVICE

Train (12)	Engine (13)	DEPARTURE				ARRIVAL				Kind of S. (Pass. Work, Deadhead (22)
		Station (14)	Time went on duty (15)	Called to leave (16)	Time train departed (17)	Station (18)	Arrived final yard limit (19)	Time train arrived (20)	Time went off duty (21)	
Extra	817	SCO	7 ³⁰ am	8 ⁰⁰ am	8 ⁰⁰ am	SC 63	4 ³⁵ PM	4 ⁴⁰ PM	5 ³⁵ PM	Local

DELAYED TIME CLAIMED

	Hrs. (24)	Min. (25)
Total time on duty under pay	10	05
Overtime after	8	00
Total overtime	2	05

Checked:

Approved:
F.B. Birthright, Supt
Charleston Div. No. 9

I certify this report to be correct:

Signature M.K. Lloyd
Occupation Cond'r

VAY SYSTEM

rs and Trainmen

Date 9/7

10 44

Plaintiff's Exhibit 13-A

Total Time on Duty		NAME (10)	Occupation (11)	Employee Acct. Number Assigned by Carrier. To be inserted by Cond.	For use of Audit Office Only
Hrs (8)	Min. (9)				
10	05	M.K. Lloyd	Conductor	15371	
✓	✓	T.M. Wimberly	Flagman	12792	
			Barkeepman		
			Porter		
✓	✓	T.O. Crapps	Brakeman	23218	
			Brakeman		

(FOR USE OF TIMEKEEPER ONLY)

SERVICE

Class	Run No.	Rate			
		Conductor	Flagman	Brakeman	Baggageman
25	11	20			
		Constructive Miles	37		
		Straight Time Worked	800		
		Miles Paid	100		
		Overtime—Hours	208		
		Cause of Overtime			
		Extra—Hours			
		Extra Rule			
		Trips	1		

CLAIMED

ROAD		Hrs. (26)	Min. (27)
Pro rata			
Time and one-half			
Initial Terminal			
Final Terminal			

I certify this report to be correct:

Signature M.K. Lloyd
Occupation Cond'r

Appeal from Charleston County

INSTRUCTIONS

1. This report shall be rendered for all train crews, including yard and switching crews. Conductors, flagmen, train baggage men and trainmen shall also use this form when reporting individually. The report shall be rendered and signed by the conductor for the train crew. If there is no conductor it shall be rendered and signed by the ranking employee whose time is reported thereon. Reports shall be numbered consecutively for each month beginning with No. 1.
2. The report shall be dated as of the date on which the employee first goes on duty.
3. Under "Remarks" shall be shown any irregularities of the hours of duty. If an employee is released from duty for any period between the time of first going on duty and the time finally relieved from duty, such fact must be shown under "Remarks," giving the place at which the release is given, the time at which it began, and the time at which it ended. Time off duty for meals taken by yard crews shall also be shown under "Remarks." If the whole or part of service is deadheading the place at which the deadheading began and ended and the train on which the employee deadheaded will be shown. When a crew or employee is relieved before completion of a trip the name of the conductor of the crew relieving or the name of the employee relieving will be shown.
4. Whenever time is shown A. M. or P. M. shall be given.
5. In reporting delays the cause of each delay, the place at which it occurred, the time it began and the time ended shall be given. Delays due to different causes shall be shown separately.
6. All delays to passenger trains shall be shown. Delays to freight trains of less than 10 minutes at any one place need not be shown. Delays to yard and switching crews whose service is confined entirely to yard limits need not be shown.

NOTE:—Column 22 should show the class of freight service in which engaged, that is, Through, Local, Mine Run, Helper, Helper Switcher or Mixed.

DELAY REPORT

Place (28)	DURATION OF DELAY		CAUSE OF DELAY (31)
	Time began (29)	Time ended (30)	
Summerville	9 05 am	10 30 am	1 hour 10 min By Switch
Ridgeville	10 15 "	11 15 "	20 min
Pregnall	11 40 "	1 00 PM	1 hour 20 min Going to Harley
"	1 00 PM	1 45 "	45 min " # 121
"	1 45 PM	2 15 "	30 " " Switching
St George	2 15 "	4 10 "	55 " " "
Branchville	4 35 "	5 35 "	1 hour " "

1683

1682

INSTRUCTIONS

1. This report shall be rendered for all train crews, including yard and switching crews. Conductors, flagmen, train baggage men and trainmen shall also use this form when reporting individually. The report shall be rendered and signed by the conductor for the train crew. If there is no conductor it shall be rendered and signed by the ranking employee whose time is reported thereon. Reports shall be numbered consecutively for each month beginning with No. 1.
2. The report shall be dated as of the date on which the employee first goes on duty.
3. Under "Remarks" shall be shown any irregularities of the hours of duty. If an employee is released from duty for any period between the time of first going on duty and the time finally relieved from duty, such fact must be shown under "Remarks," giving the place at which the release is given, the time at which it began, and the time at which it ended. Time off duty for meals taken by yard crews shall also be shown under "Remarks." If the whole or part of service is deadheading the place at which the deadheading began and ended and the train on which the employee deadheaded will be shown. When a crew or employee is relieved before completion of a trip the name of the conductor of the crew relieving or the name of the employee relieving will be shown.
4. Whenever time is shown A. M. or P. M. shall be given.
5. In reporting delays the cause of each delay, the place at which it occurred, the time it began and the time ended shall be shown. Delays due to different causes shall be shown separately.
6. All delays to passenger trains shall be shown. Delays to freight trains of less than 10 minutes at any one place need not be shown. Delays to yard and switching crews whose service is confined entirely to yard limits need not be shown.

NOTE:—Column 22 should show the class of freight service in which engaged, that is, Through, Local, Mine Run, Helper, Helper Switcher or Mixed.

DELAY REPORT

Place (28)	DURATION OF DELAY		CAUSE OF DELAY (31)
	Time began (29)	Time ended (30)	
Summerville	9 05 am	10 30 am	1 hour 10 min By Switching
Ridgeville	10 15 "	11 15 "	20 min
Pregnall	11 40 "	1 00 PM	1 hour 20 min Going to Harleyville + Return
"	1 00 PM	1 45 "	45 min " # 121
"	1 45 PM	2 15 "	30 " " Switching
St George	2 15 "	4 10 "	55 " " "
Branchville	4 35 "	5 35 "	1 hour " "

1682

1681

In the same form and filled out in like manner as Plaintiff's Exhibit 13-A are the following similar exhibits which are certified up to the Appellate Court, to wit:

Southern Rwy. Co. v. Order of Rwy. Con. of America

Exhibit 13-B, 1944, Sept. 9—M. K. Lloyd, Conductor.

1685 Exhibit 13-C, 1944, Oct. 24—M. K. Lloyd, Conductor.

Exhibit 13-D, 1944, Oct. 26—M. K. Lloyd, Conductor.

Exhibit 13-E, 1944, Oct. 28—M. K. Lloyd, Conductor.

Exhibit 13-F, 1944, Oct. 30—M. K. Lloyd, Conductor.

Exhibit 13-G, 1944, Oct. 31—M. K. Lloyd, Conductor.

Exhibit 13-H, 1944, Nov. 4—M. K. Lloyd, Conductor.

Exhibit 13-I, 1944, Nov. 16—M. K. Lloyd, Conductor.

Exhibit 13-J, 1944, Nov. 28—M. K. Lloyd, Conductor.

Exhibit 13-K, 1944, Nov. 30—M. K. Lloyd, Conductor.

1686 Exhibit 13-L, 1944, Dec. 4—M. K. Lloyd, Conductor.

Exhibit 13-M, 1944, Dec. 7—M. K. Lloyd, Conductor.

Exhibit 13-N, 1944, Dec. 9—M. K. Lloyd, Conductor.

Exhibit 13-O, 1944, Dec. 14—M. K. Lloyd, Conductor.

Exhibit 13-P, 1944, Dec. 21—L. M. Dukes, Conductor.

Exhibit 13-Q, 1944, Dec. 23—L. M. Dukes, Conductor.

Exhibit 13-R, 1944, Dec. 26—L. M. Dukes, Conductor.

Exhibit 13-S, 1945, Jan. 27—R. E. Bolehoz, Conductor.

Exhibit 13-T, 1945, Feb. 27—M. K. Lloyd, Conductor.

1687 Exhibit 13-U, 1945, Mch. 8—J. D. Pooser, Conductor.

Exhibit 13-V, 1945, Mch. 15—M. K. Lloyd, Conductor.

Exhibit 13-W, 1945, Mch. 17—M. K. Lloyd, Conductor.

Exhibit 13-X, 1945, June 7—M. S. Dewitt, Conductor.

Exhibit 13-Y, 1945, June 21—M. S. Dewitt, Conductor.

Exhibit 13-Z, 1945, June 23—M. S. Dewitt, Conductor.

Exhibit 13-AA, 1945, June 28, M. S. Dewitt, Conductor.

Exhibit 13-BB, 1945, July 12—M. S. Dewitt, Conductor.

No. 17

Time return and delay report of Conductors and Trainmen

Date 9-24 and Trainmen

Date 9-24 1943

Plaintiff's Exhibit 15-A Form 936

[illegible]

REMARKS:

[illegible]

DELATED TIME CLAIMED		
	Hrs. (24)	Min. (25)
Total time on duty under pay		
Overtime after		
Total overtime		

ROAD {

Pro rata

Time and one-half

Initial Terminal

Final Terminal

Checked: F.B. Birthright, Supt Approved: Charleston Div. No. 9

I certify this report to be correct:
Signature M. S. Dewitt
Occupation Cond'r

Total Time on Duty		NAME (10)	Occupation (11)		Employee Acct. Number Assigned by Carrier. To be inserted by Cond.	For use of Audit Office Only
Hrs. (8)	Min. (9)					
15	15	M. S. Dewett	Conductor	3	12835	
✓	✓	M. Q. Smith	Flagman	4	12845	
			Baggageman	6		
			Porter	7		
✓	✓	A. A. Waltz Jr	Brakeman	4	12872	
			Brakeman	4		

SERVICE						(FOR USE OF TIMEKEEPER ONLY)							
						Class	Run No.	Rate					
						2 S	11	20					
										Conductor	Flagman	Brakeman	Baggage-men
						Constructive Miles							
						Straight Time Worked		1023					
						Miles Paid		128					
						Overtime—Hours		5'02					
						Cause of Overtime							
						Extra—Hours							
						Extra Rule							
						Trips		1					

ARRIVAL					Kind of Service (Pass., Frt., Work, Yard, Deadhead, etc.) (22)	Mileage (23)
Arrived final yard limit (19)	Time train arrived (20)	Time went off duty (21)				
9:25 P	9:30 P	9:35 P	Local Ft		128	

CLAIMED				Hrs. (26)	Mins. (27)
ROAD { Pro rata				—	—
Time and one-half				5	01
Initial Terminal				—	—
Final Terminal				—	—

I certify this report to be correct:

Signature M. S. Dewitt

Occupation Cond'r

1693

INSTRUCTIONS

1. This report shall be rendered for all train crews, including yard and switching crews. Conductors, flagmen, train baggage-men and trainmen shall also use this form when reporting individually. The report shall be rendered and signed by the conductor for the train crew. If there is no conductor it shall be rendered and signed by the ranking employee whose time is reported thereon. Reports shall be numbered consecutively for each month beginning with No. 1.
2. The report shall be dated as of the date on which the employee first goes on duty.
3. Under "Remarks" shall be shown any irregularities of the hours of duty. If an employee is released from duty for any period between the time of first going on duty and the time finally relieved from duty, such fact must be shown under "Remarks," giving the place at which the release is given, the time at which it began, and the time at which it ended. Time off duty for meals taken by yard crews shall also be shown under "Remarks." If the whole or part of service is deadheading the place at which the deadheading began and ended and the train on which the employee deadheaded will be shown. When a crew or employee is relieved before completion of a trip the name of the conductor of the crew relieving or the name of the employee relieving will be shown.
4. Whenever time is shown A. M. or P. M. shall be given.
5. In reporting delays the cause of each delay, the place at which it occurred, the time it began and the time ended shall be given. Delays due to different causes shall be shown separately.
6. All delays to passenger trains shall be shown. Delays to freight trains of less than 10 minutes at any one place need not be shown. Delays to yard and switching crews whose service is confined entirely to yard limits need not be shown.

NOTE.—Column 22 should show the class of freight service in which engaged, that is, Through, Local, Mine Run, Helper, Helper Switcher or Mixed.

DELAY REPORT

Place (28)	DURATION OF DELAY		CAUSE OF DELAY (31)
	Time began (29)	Time ended (30)	
Summerville	8 00 A M	8 35 A M	Work + Ft 27
Pregnall	9 50 "	1 45 P M	Unloading Ballast
St. George	2 00 P M	2 50	Work
Branchville	3 25 "	4 05	"
Orangeburg	4 35 "	6 00	"
St. Matthews	6 25 "	6 55	"
Singleton	7 05 "	7 20	By Ft 28 + Ft 11
Kingville	7 45 "	8 15	Work + Packing Hot Box
Hopkins	8 35 "	8 45	By Ex 4597 East

1694

1695

In the same form and filled out in like manner as Plaintiff's Exhibit 15-A are the following similar Exhibits which are certified up to the Appellate Court, to wit:

1696

Exhibit 15-B, 9-25, 1943—J. E. Pearce, Conductor; S. J. Dukes, Flagman; F. S. Stephenson, Brakeman; overtime 5 hrs. 11 min.; delay at Pregnall 1 hr. 10 min. switching, 2hrs. 50 min. unloading rock.

Appeal from Charleston County

Exhibit 15-D, 11-5, 1943—M. S. Dewett, Conductor; M. Q. Smith, Flagman; V. G. Bell, Brakeman; overtime 5 hrs. 41 min.; delay at Pregnall 3 hrs. 45 min. unloading ballast.

Exhibit 15-E, 11-8, 1943—M. S. Dewett, Conductor; J. G. Voss, Flagman; V. G. Bell, Brakeman; overtime 5 hrs. 01 min.; delay at Pregnall, 4 hrs. 35 min. unloading ballast and rail.

Exhibit 15-F, 11-12, 1943—M. S. Dewett, Conductor; M. Q. Smith, Flagman; V. G. Bell, Brakeman; overtime 5 hrs. 16 min.; delay at Pregnall, 5 hrs. 25 min. unloading ballast.

Exhibit 15-G, 11-17, 1943—M. Q. Smith, Conductor; B. H. McKeithan, Flagman; R. B. Wright, Brakeman; overtime 4 hrs. 31 min.; delay at Pregnall, 40 min. switching, 4 hrs. 30 min. Harleyville.

Exhibit 15-H, 11-18, 1943—V. J. Dukes, Conductor; E. L. Childers, Flagman; G. F. Rickenbaker; overtime 5 hrs. 16 min.; delay at Pregnall, 2 hrs. 30 min. switching, 3 hrs. unloading ballast.

Exhibit 15-I, 12-6, 1943—M. S. Dewett, Conductor; M. Q. Smith, Flagman; M. E. Rowell, Brakeman; overtime 4 hrs. 26 min.; delay at Pregnall, 4 hrs. 25 min. unloading ballast.

PLAINTIFF'S EXHIBIT 2
SOUTHERN RAILWAY SYSTEM
OFFICE OF SUPERINTENDENT
CHARLESTON, S. C.

Charleston, S. C., September 11, 1944. s-p

— 37 —

Mr. M. K. Lloyd:

Referring to your ticket No. 4 September 7 claiming extra compensation for trip from Pregnall to

Southern Rwy. Co. v. Order of Rwy. Con. of America

Aluminum Plant. Please advise under what rule this claim is made.

1791

(s) F. B. B.

PLAINTIFF'S EXHIBIT 3

1500M 11-42.

Form 812

SOUTHERN RAILWAY COMPANY
OFFICE OF SEPT. 24thMr. F. B. Birthright
Supt.

1792

Dear Sir:

I have yours of Sept. 11th with reference to Claim of Conductor M. K. Lloyd for 100 miles for side trip from Pregnalls, S. C. to Harleyville, S. C. and return to Pregnalls, S. C. a distance of 6 & 3/4 miles in each direction a total 13 1/2 miles as you know this is a new track that have been bilt leading off from our main line at Pregnalls, S. C. to the aluminum plant at Harleyville, S. C.

1793

However, I take the position this is a extra side trip not pertaining to regular trip Chas., S. C. to Branchville, S. C.

Hoping you will check payment.

Yours respectfully,

(s) E. O. UTSEY
LOCAL CHAIRMANIF NOT ALLOWED PLEASE RETURN
ALL PAPERS.

1794

SUPREME COURT

427

Appeal from Charleston County

PLAINTIFF'S EXHIBIT 5

SOUTHERN RAILWAY SYSTEM

OFFICE OF SUPERINTENDENT

CHARLESTON, S. C.

Charleston, 12, S. C. Sept. 25, 1944.

— 37 —

Mr. E. O. Utsey, Local Chairman,
Order of Railway Conductors,
Charleston, South Carolina.

Dear Sir:-

Referring to claim of Conductor M. K. Lloyd for extra compensation covering trip from Pregnall to Aluminum Plant and return, September 7 and September 9, 1944.

These claims are declined as I do not know of any rule under which additional compensation would apply for this service.

Very truly yours,

(s) W. H. Oglesby
Superintendent.

Southern Rwy. Co. v. Order of Rwy. Con. of America

PLAINTIFF'S EXHIBIT 6

1700

J. T. LAWRENCE, Chairman
R. D. 7
Knoxville, Tennessee
Phone 3-9140

Z. H. DEEM, Vice-Chairman
2111 Reno Avenue
New Albany, Indiana

J. R. RAGLAND, Secretary
726 South 42nd Street
Louisville, Kentucky

ORDER OF RAILWAY CONDUCTORS
OF AMERICA

GENERAL COMMITTEE OF ADJUSTMENT
SOUTHERN RAILWAY SYSTEM

(RECEIVED)
(OCT 13 1944)
(ASST. VICE PRESIDENT)
(C.D.M.)

1710

KNOXVILLE, TENNESSEE

Mr. R. P. Travis, Personnel Officer
Southern Railway System
Washington, D. C.

October 10, 1944.

Dear Sir:-

1711

Please list the following claim of Conductor M. K. Lloyd, Charleston Division, for 100 miles at local freight rate in addition to his regular trip on train 60 and 61, on September 7th and 9th on local freight train between Charleston and Branchville, for being required to make lap back trip from Pregnall to Harleyville, South Carolina, for the purpose of switching the aluminum plant 6.3 miles from the main line at Pregnall to the plant which is government track from the Southern Railway main line at Pregnall.

1712

Filing of claim was held up as Superintendent Birthright had advised Local Chairman Utsey he was trying to get ruling, but never advised him, hence the above claims were filed and declined by the Superintendent on September 25th.

Appeal from Charleston County

You may hold these claims for disposition as previously referred to, together with other lap back claims. But as I understand it, this lap back trip is required daily.

Yours truly,

(s) J. T. LAWRENCE

J. T. LAWRENCE, General Chairman,
Order of Railway Conductors,
Southern Railway System.

PLAINTIFF'S EXHIBIT 7

C. D. MACKAY,
Assistant Vice President
G. H. DUGAN,
Assistant to Vice President
R. P. TRAVIS,
Personnel Officer
J. W. COX,
Assistant Personnel Officer

J. C. VORWERCK,
Supt. Joint Facilities
L. G. TOLLESON,
Asst. to Personnel Officer
H. W. HAWKINS,
Chief Time Inspector

SOUTHERN RAILWAY SYSTEM
OPERATING DEPARTMENT
WASHINGTON, 13, D.C.

December 19, 1944. S

LF 9-L-44

Mr. J. T. Lawrence, General Chairman,
Order of Railway Conductors,
508 Martin Mill Pike,
Knoxville, Tennessee.

Dear Sir:

I refer to your letter of October 10, 1944 to Mr. Travis, appealing to him the claim of Conductor M. K. Lloyd, Charleston Division, for pay for 100 miles at local freight rate in addition to pay for his regular trip on trains 60 and 61, September 7 and 9, 1944, account being required to make a movement from Pregnali to Harleyville, S. C., for

Southern Rwy. Co. v. Order of Rwy. Con. of America

the purpose of performing switching in the aluminum plant.

We discussed this claim in conference in my office December 13, and I declined payment. This will confirm that declination. I cannot subscribe to the theory that claimant made a so-called lap back trip which is the basis on which you are handling the claim.

Very truly yours,

(s) J. W. Cox,

Assistant Personnel Officer.

PLAINTIFF'S EXHIBIT 8

J. T. LAWRENCE, Chairman
R. D. 7
Knoxville, Tennessee
Telephone 3-9140

Z. H. DEEM, Vice-Chairman
2111 Reno Avenue
New Albany, Indiana

J. R. BAGLAND, Secretary
726 South 43rd Street
Louisville, Kentucky

ORDER OF RAILWAY CONDUCTORS OF AMERICA

GENERAL COMMITTEE OF ADJUSTMENT SOUTHERN RAILWAY SYSTEM

(RECEIVED)
(DEC 30 1944)
(ASST VICE PRESIDENT,)
(C.D.M.)

KNOXVILLE, TENNESSEE

December 26, 1944.

Mr. J. W. Cox, Assistant Personnel Officer,
Southern Railway System,
Washington, D. C.

Dear Sir:

This refers to your letter of December 19th, your file LF-9-L-44, further declining the claim of Conductor M. K. Lloyd, Charleston Division, for 100 miles at local freight rate in addition to pay

SUPREME COURT

431

Appeal from Charleston County

for his regular trip on trains 60 and 61, September 7th and 9th, 1944, for being required to make a turnaround movement from Peggall, to Harleyville. Which movement was in violation of Article 5-(a).

As you claim this is not a lap back movement under your definition of a lap back movement, and as the case has been discussed as required by the Railway Labor Act. The claim will be progressed in due time.

Yours truly,

(s) J. T. LAWRENCE

J. T. Lawrence, General Chairman,
Order of Railway Conductors,
Southern Railway System.

PLAINTIFF'S EXHIBIT 9

C. D. MACKAY,
Assistant Vice President
G. H. DUGAN,
Assistant to Vice President
R. P. TRAVIS
Personnel Officer
J. W. COX
Assistant Personnel Officer

J. C. A. ...
Supt. ... Facilities
L. G. TOLLESON,
Asst. to Personnel Officer
R. W. HAWKINS,
Chief Time Inspector

SOUTHERN RAILWAY SYSTEM
OPERATING DEPARTMENT
WASHINGTON 13, D.C.

March 23, 1945, es
LF-9-L-44

Mr. J. T. Lawrence, General Chairman,
Order of Railway Conductors,
508 Martin Mill Pike,
Knoxville, Tennessee.

Dear Sir:

I refer to your letter of December 26, 1944 and previous correspondence concerning the claim of

Southern Rwy. Co. v. Order of Rwy. Con. of America

1725 Conductor M. K. Lloyd, Charleston Division, for pay for 100 miles at local freight rate in addition to pay for his regular trip on local freight trains 60 and 61, September 7 and 9, 1944, account being required to make a movement from Pregnall to Harleyville, S. C., for the purpose of serving the aluminum plant of the Defense Plant Corporation at Harleyville.

1726 As I understand your letter of October 10, 1944 to Mr. Travis and your letter of December 26, 1944 to me, you base the claims on Article 5-(a) of the Conductors' Schedule and contend that the conductor made a so-called lap back movement when switching the aluminum plant. It seems to me that the situation at Pregnall is identical to the situation at many other industries; that is, the industry owns the track either from the clearance point or the right of way line into the plant and owns all of the plant tracks. Road crews cut off from their train and take cars into industries and place them on tracks belonging to the industries and pick up cars from such tracks. In some instances, industries have their own switch engines and perform all intra-plant switching. Nevertheless, road crews have always been required to go over the tracks belonging to the industries into the plant and deliver and pick up cars. This is normal railroad operation. The railroads could not serve industries if such moves were not made. Never in the history of this railroad has a crew filed claim alleging Article 5-(a) was violated or that they were required to make a so-called lap back movement in serving the industries in this manner. The movement involved in serving the aluminum plant of the Defense Plant Corporation is identical to

1727

1728

Appeal from Charleston County

movements made every day by road crews in serving other industries at other points. This being true, will you please be kind enough to advise me how you differentiate between the operation involved in serving the aluminum plant of the Defense Plant Corporation and in serving other industries? Why to you contend Article 5-(a) is being violated in serving this plant when no such contention has ever been made with respect to similar service afforded other industries throughout the years on this railroad?

Very truly yours,

(s) J. W. Cox,

Assistant Personnel Officer

PLAINTIFF'S EXHIBIT 10

C. D. MACKAY,
Assistant Vice-President
G. H. DUGAN,
Assistant to Vice-President
R. P. TRAVIS
Personnel Officer
J. W. COX
Assistant Personnel Officer

J. C. VORWERCK,
Supt. Joint Facilities
L. G. TOLLESON,
Asst. to Personnel Officer
R. W. HAWKINS,
Chief Time Inspector

SOUTHERN RAILWAY SYSTEM
OPERATING DEPARTMENT
WASHINGTON 13, D.C.

March 30, 1945. cs
LF-9-L-44

Mr. J. T. Lawrence, General Chairman,
Order of Railway Conductors,
508 Martin Mill Pike,
Knoxville, Tennessee.

Dear Sir:

In our conference of March 28, 1945, we discussed the claim of Conductor M. K. Lloyd,

Southern Rwy. Co. v. Order of Rwy. Con. of America

1733

Charleston Division, for pay for 100 miles at local freight rate in addition to pay for his regular trip on local freight trains 60 and 61, September 7 and 9, 1944, account being required to make a movement from Pregnall to Harleyville, S. C. for the purpose of serving the aluminum plant of the Defense Plant Corporation at Harleyville.

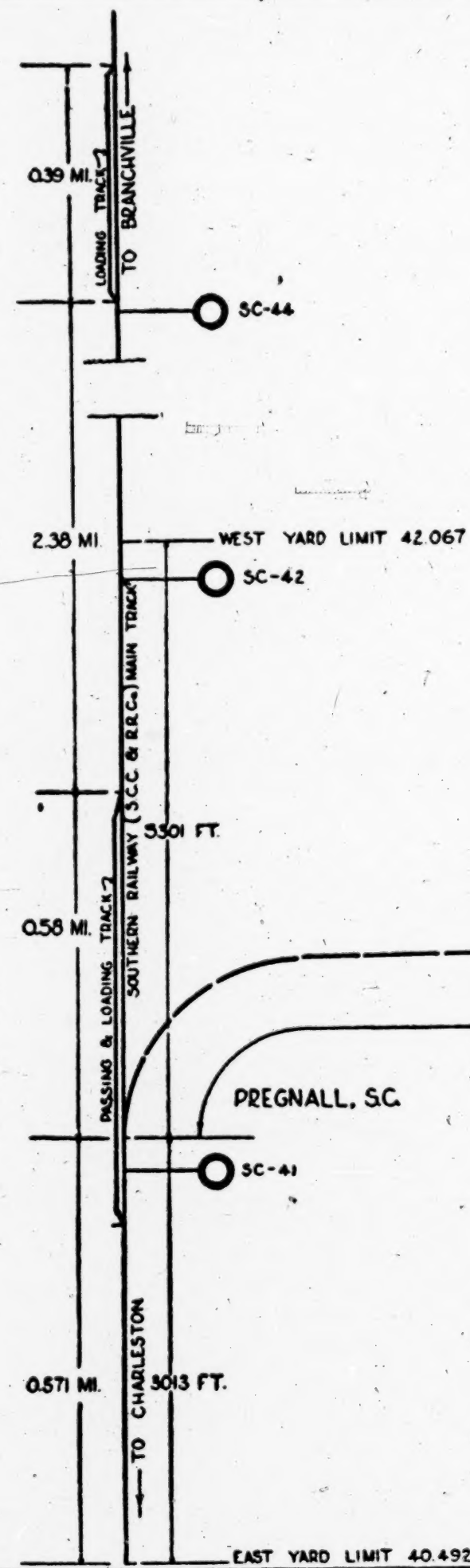
1734

You stated at the beginning of the discussion that you had appealed certain other similar claims to General Manager Adams and that he had not, up to the present time, replied to your letter. Under these circumstances, as these claims were not then before me, we did not discuss them in detail. We did, however, discuss the matter in a general way and agreed to look into the matter further with the view of seeing whether or not a settlement can be reached. In our discussion, I drew your attention to my letter to you of March 23, 1945 in connection with this particular matter and requested that you reply to the letter: This you said you would do. I realized at the time that you had not had an opportunity to do so when we discussed the claims.

1735

In our discussion, you indicated that you had been informed the locals were operated under train orders as extras between Pregnall and Harleyville, and I told you that was not my understanding, but I would look into this particular matter and advise you. The question was also raised as to whether or not trains of other carriers use the track between Pregnall and Harleyville. I will also look into that matter and advise you. Meanwhile, I should like to have a reply to my letter of March 23. I should also like for you to state

1736



SOUTHERN RAILWAY SYSTEM
EASTERN LINES EASTERN LINES
PREGNALL, S.C.
SKETCH SHOWING SKETCH SHOWING
TRACK TO ANCOR CORPORATION ANCOR CORPORATION PLANT
SCALE 1" = 1000' APPROX.

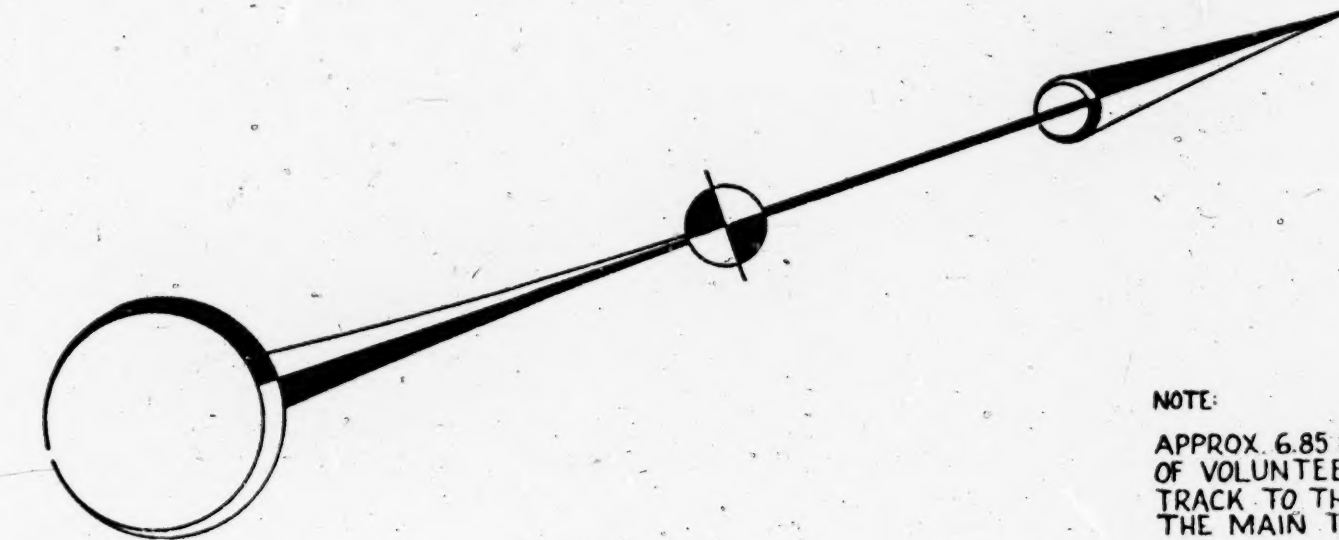
FEBRUARY 2, 1946
REV. MARCH 25, 1946
REV. APRIL 29, 1947
REV. MAY 8, 1947

ANCOR CORPORATION TRACK

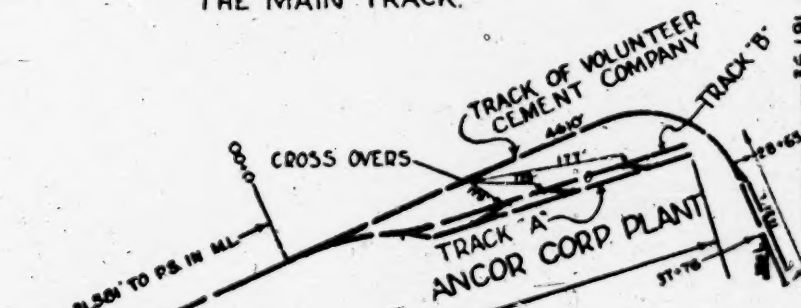
6.26 MILES TO PLANT

ON TRACK

5 MILES TO PLANT



NOTE:
APPROX. 6.85 MI. FROM END
OF VOLUNTEER CEMENT CO'S
TRACK TO THE SWITCH IN
THE MAIN TRACK.



OFFICE OF CH

OFFICE OF CHIEF ENGINEER MW&S CHARLOTTE, N.C.

G 647	SURVEY	WRT
	DRAWN	
	CHECKED	
	BY	
	DATE	
	FILE NO.	

Appeal from Charleston County

the rules in the schedule on which you reply in support of your position.

1737

Very truly yours,

(s) J. W. Cox,

Assistant Personnel Officer.

PLAINTIFF'S EXHIBIT 12

This is the same as Exhibit "A" of the Complaint, viz., Schedule of Wages, Rules and Regulations for Conductors, printed pamphlets of which are filed separately as a part of the Transcript of Record.

1738

DEFENDANT'S EXHIBIT A-1

For Identification

Charleston, S. C. June 29, 1945.

Condr. Local Extra 817 West June 30th. Line St.

Engr. Local Extra 817 West June 30th. Line St.

Mr. Birthright Mr. Graham Mr. Hutto Mr. Ackerman Disprs.

It will NOT be necessary for local extra 817 west (No. 61) to go to Harleyville June 30th.

1739

COL

HLB

DEFENDANT'S EXHIBIT A-2

For Identification

Charleston, S.C., Sept. 20th, 1945

Condr. No. 61, Line St., Sept. 21st

Engr. No. 61, Line St., Sept. 21st

Mr. Birthright, Mr. Graham, Mr. Hutto, Mr. Ackerman, Dispatchers.

1740

No. 61 Sept. 21st, (Friday), go to Harleyville and

Southern Rwy. Co. v. Order of Rwy. Con. of America

1741 place eight cars coal, one car brick and one car soda ash at Plant for unloading, also move two empty coal cars out.

Classify train leaving Pregnall as follows:

8 cars coal first

one car brick second

one car soda ash third

1742 Maximum speed between Pregnall and Harleyville Plant 20 miles per hour, except reduce speed to ten miles per hour around the two curves between Harleyville and the Plant. These restrictions apply both directions.

Be sure and prepare mimeographed form 100 to cover this trip and mail to me.

C.O.L.

DEFENDANT'S EXHIBIT A-3

For Identification

Charleston, S.C., August 31st, 1945

1743 Condr. No. 61, Line St., Sept. 1st

Engr. No. 61, Line St., Sept. 1st.

Copy: Mr. Birthright, Mr. Graham, Mr. Hutto,
Mr. Ackerman

It will NOT be necessary for No. 61 to go to Harleyville tomorrow Sept. 1st.

C.O.L.

Copy: Mr. Bradford,
Dispatchers.

Appeal from Charleston County

DEFENDANT'S EXHIBIT A-4

For Identification

1745

Charleston, S.C., June 22, 1945

Condr. Local West (No. 61) June 23rd

Engr. Local West (No. 61) June 23rd

Mr. Birthright, Mr. Graham, Mr. Hutto, Mr.
Ackerman, Dispatchers

Local West (No. 61) June 23rd, go to Harleyville, move loads from Pregnall for Harleyville, and place at Plant. Move all empties from Harleyville and get billing at St. Georges. Maximum speed between Pregnall and Harleyville Plant . . . 20 miles per hour, except reduce speed to ten miles per hour around the two curves between Harleyville and the Plant. These speed restrictions apply both directions.

1746

Get usual order at Dorchester.

If you have any empty system box cars, apply on orders and leave surplus at Branchville. If any foreign boxes, use what you need to apply on orders, and leave surplus at Branchville, billing surplus miscellaneous foreign empty boxes to COLUMBIA on Order 505. If any empty low side gondos with solid ends, bill to MASCOT, TENN., on ORDER 815.

1747

If any flat bottom coal cars moved from Harleyville, use them to apply on orders and leave surplus at Branchville.

If any empty gondos with drop ends, bill to COLUMBIA.

Classify train leaving Pregnall as follows:

No loads to move from Pregnall. Move two empties from Harleyville.

1748

Southern Rwy. Co. v. Order of Rwy. Con. of America

Be sure to prepare mimeographed form 100 to cover this trip.

1749

C. O. Lineberger,
Chief Train Dispatcher

Copy: H. L. BRADFORD, Branchville

DEFENDANT'S EXHIBIT B-1

For Identification

STANDARD TRAIN ORDER BLANK FOR 19

FORM ORDER FORM
19 SOUTHERN RAILWAY SYSTEM 19

Train Order No. 21 Dated Chas., S. C. 2/22/1945

TO: Exa 817 West AT: Dorchester, S. C.

X Opr. M.

FIRST No. 12 Twelve Eng. 1200 wait at Harleyville
Branch Switch Pregnall until 1135 Eleven Thirty five
am for Exa 817 West.

C.O.L. Chief Dispatcher

Conductor and Engineman must each have a copy of
this Order.

1751 Made COMP. TIME 1104 a.m. RUMPH, Opr.

DEFENDANT'S EXHIBIT B-2

For Identification

STANDARD TRAIN ORDER BLANK

FORM FOR 19 ORDER FORM
19 SOUTHERN RAILWAY SYSTEM 19

JC

1752 TRAIN ORDER NO. 35 DATE: Chas. 7-14-1945

TO C E EXA 817 West AT DORCHESTER, S. C.

X OPR M.

SUPREME COURT

439

Appeal from Charleston County

NO. 12 TWELVE ENG. 1208 WAIT AT HARLEY-
VILLE BRANCH SWITCH PREGNALL UNTIL
1145 ELEVEN FORTY FIVE AM FOR EXA 817
WEST

1753

C.O.L.

Chief Dispatcher

Conductor and Engineman must each have a copy of
this Order.

MADE COMPLETE TIME 1104 A.M.
ACKERMAN OPR.

DEFENDANT'S EXHIBIT B-3

1754

For Identification

STANDARD TRAIN ORDER BLANK
FORM FOR 19 ORDER FORM
19 SOUTHERN RAILWAY SYSTEM 19
JC.

Train Order No. 42 Dated Chas. 8-2-1945

TO C E EXA 817 West AT Dorchester, S. C.

X..... OPR.....M.

1755

NO 12 TWELVE ENG. 1227 MEET EXTRA 817
WEST AT HARLEYVILLE BRANCH SWITCH
PREGNALL

C.O.L.

Chief Dispatcher

Conductor and Engineman must each have a copy of
this Order.

MADE TIME 1138 A.M. Opr.

1756

Southern Rwy. Co. v. Order of Rwy. Con. of America

DEFENDANT'S EXHIBIT G

1757

For Identification

(No. 1)

MEMORANDUM OF UNDERSTANDING

WHEREAS, a controversy exists with respect to payment for certain so-called "lapback movements" or "inside turns"; and

WHEREAS, it is desired by the parties hereto to dispose of the same and thereby avoid further controversy;

1758

NOW, THEREFORE, it is agreed that this matter shall be disposed of as follows:

1759

(1) That Articles 2 (a), 5 (a) and (b), 8 (a) and (b), including the first Note thereunder, of Conductors' schedule of companies parties hereto, and similar provisions in schedules of Engineers, Firemen, Trainmen and Yardmen, are amended to the extent hereinafter provided. While this agreement will take precedence over and be effective in lieu of schedule rules or understandings in conflict herewith, it does not alter, change or amend such rules with respect to matters not herein dealt with. The execution of this Memorandum is without precedent or prejudice to respective contentions of either of the parties hereto with respect to questions not disposed of herein.

1760

(2) Where the phrases "lapback movements" or "inside turns" are used in this Memorandum of Understanding, the words mean the turning back of a crew for a distance of one-half mile or more in one direction, provided, however, that in the case of shoving trains, the distance specified in this para-

Appeal from Charleston County

graph shall be one-quarter mile in one direction instead of one-half mile as hereinbefore specified.

1761

The turning back of the crew must be:

- (a) Over territory previously operated over
- (b) Between terminals on a straightaway run from one terminal to another terminal

or

Between terminal and turning point or between turning point and starting terminal on a turnaround run from a terminal to an intermediate point and return to the starting terminal

1762

- (c) For the purpose of performing additional service not a part of the continuous trip, such as cutting off to assist other trains—returning to station last passed after departing therefrom to perform service that could have been performed before train departed from such station—thereby interrupting such continuous trip.

NOTE: It is not intended by this Memorandum to authorize lapback trips for the purpose of moving tonnage in excess of the rating of the engine used, and if a lapback is made for this purpose, payment therefor is not settled or agreed upon by this Memorandum.

1763

The provisions of this Memorandum apply to lapback movements or inside turns in passenger service, through freight service, local freight service, and mixed service.

- (3) None of the provisions of this Memorandum apply to branch line, specified or anomalous service, bona fide work or construction service trains, wreck-

1764

Southern Rwy. Co. v. Order of Rwy. Con. of America

1766

ing service, mine run service, helper service, and helper switcher service, it being recognized that in such service lapback movements or inside turns without additional payments are permissible. (It is not intended by this paragraph to change present practice of operating mine runs.)

1766

(4) When an Engineer, Fireman (Helper), Conductor or Trainman is required to make a lapback movement or inside turn to extent specified herein, compensation for such additional miles actually run, additional hours on duty and additional service performed shall all be covered in payments to be made on the following basis:

(a) *Passenger Service:*

2 hours and 30 minutes or
less or 50 miles or less . . . 50 miles at through
freight rate.

Over 2 hours and 30 min-
utes and not over 5 hours
or over 50 miles and not
over 100 miles . . . 100 miles at through
freight rate.

1767

(b) *Through Freight and Mixed Service:*

4 hours or less or 50 miles
or less . . . 50 miles at through
freight rate.

Over 4 hours and not over
8 hours or over 50 miles
and not over 100 miles . . . 100 miles at through
freight rate.

(c) *Local Freight and Mixed Service:*

(*Paying local freight rate*)

1768

4 hours or less or 50 miles
or less . . . 50 miles at local
freight rate.

Appeal from Charleston County

Over 4 hours and not over
8 hours or over 50 miles
and not over 100 miles ... 100 miles at local
freight rate.

1769

When the above payments are made the time consumed in making such lapback movement or inside turn shall be deducted for the purpose of computing overtime, but miles run or paid for will not be counted for the purpose of extending the time when overtime will begin. Time engaged in making such a movement shall be computed from time such movement is actually begun until crew returns to starting point of such lapback or inside turn.

1770

NOTE 1: When a lapback is paid for under the provisions hereof, Article 10 will not apply because of any service performed in such lapback movement. If, on the day or trip, the crew performs other service to which Article 10 would apply, such Article is to be applicable but will not change the basis of payment for the lapback trip.

NOTE 2: Nothing in this agreement applies to doubling hills or running for water or other service for which there is already provided a specific method of payment in the schedule of a particular company and a particular organization.

1771

(5) If more than one lapback movement or inside turn is made on a day or trip, the additional time so worked, additional service performed, and additional miles actually run shall be combined and payments made under the provisions of this Memorandum, provided, however, that in such case, the payment for all such lapback trips will be a minimum of 100 miles.

1772

(6) The provisions of this lapback Memorandum do not relate to the performance of work train or

Southern Rwy. Co. v. Order of Rwy. Con. of America

wrecking service, which is disposed of by another Memorandum of even date herewith.

1773

(7) Pending lapback claims shall be disposed of on basis of payment provided herein.

(8) This Memorandum of Understanding shall be effective as of the First Day of August 1945 and shall remain in effect subject to thirty (30) days' written notice by any party hereto of desire to cancel, alter or amend.

A C C E P T E D

1774

For the Employees:

Signed — J. T. LAWRENCE
General Chairman,
Order of Railway Conductors
(except GS&F)

Signed — F. C. HARRISON
General Chairman,
Brotherhood of Locomotive
Engineers.

1775

Signed — W. C. OWENS
Acting General Chairman,
Brotherhood of Locomotive Fire-
men and Enginemen.

Signed — JNO. F. SCOTT
General Chairman,
Brotherhood of Railroad
Trainmen.

1776

Signed — C. E. ROBERTS
General Chairman,
Brotherhood of Railroad
Trainmen.

Appeal from Charleston County

For the Carriers:

Signed — C. D. MACKAY
Assistant Vice President

1777

Southern Railway Company,
The Cincinnati, New Orleans and
Texas Pacific Railway Company,
The Alabama Great Southern Rail-
road Company.

New Orleans and Northeastern
Railroad Company,

Georgia Southern and Florida
Railway Company.

1778

Washington, D. C.

July 30, 1945. *

Q. 1 - As to lapbacks referred to in this Memorandum does this term mean a lapback made on the main line over which the train is moving between terminal and terminal or terminal and turning point or returning from turning point to terminal?

1779

A. - Yes.

Q. 2 - Man enroute John Sevier to Asheville arrives New Line is directed to go to Morristown and get a car and return to New Line because he is not going to Morristown.

A. - This being a side trip it is not covered by the Memorandum.

Q. 3 - Man operating between Oakdale and Knoxville arrives at Clinton, Tenn., is directed to go to Lake City and return to Clinton, Tenn., 20 miles and go to destination.

1780

A. - Same as Q. 2.

Southern Rwy. Co. v. Order of Rwy. Con. of America

Q. 4 - Are Articles 16 and 8 affected by this Memorandum?

1781

A. - No, see paragraph (1).

Q. 5 - Where a train pulls a draw head, puts part of his train in siding, returns and chains up, is lapback involved?

A. - No lapback is made, see paragraph (2) (c).

Q. 6 - In the same illustration train goes into or out of home terminal.

A. - Schedule rules as to operating into and out of home terminal would apply.

1782

Q. 7 - At an intermediate point, crew returns over main line within yard or station limits, a distance of more than 1/2 mile in one direction, to pick up car. Is this a lapback movement?

A. - No.

1783

Q. 8 - Continuous trip of crew making straightaway run from Alexandria to Monroe is interrupted at Orange where engine is cut off and another train assisted Orange to Montpelier. Crew returns to Orange and continues trip to Monroe. Was the movement Orange to Montpelier and return deemed to be a "lapback movement" or "inside turn"?

A. - Yes - see paragraph (2).

Q. 9 - Continuous trip of crew making straightaway run from Birmingham to Atlanta is interrupted at Bremen where engine is cut off and crew returns to Tallapoosa to pick up car for movement to Atlanta. Car is picked up and crew returns to Bremen where train is picked up and trip continued to Atlanta. Was the movement from Bremen to Tallapoosa and return considered a "lapback movement" or "inside turn"?

1784

A. - Yes - see paragraph (2).

Q. 10 - Train on turnaround basis has reached its turning point and is sent to an intermediate point and

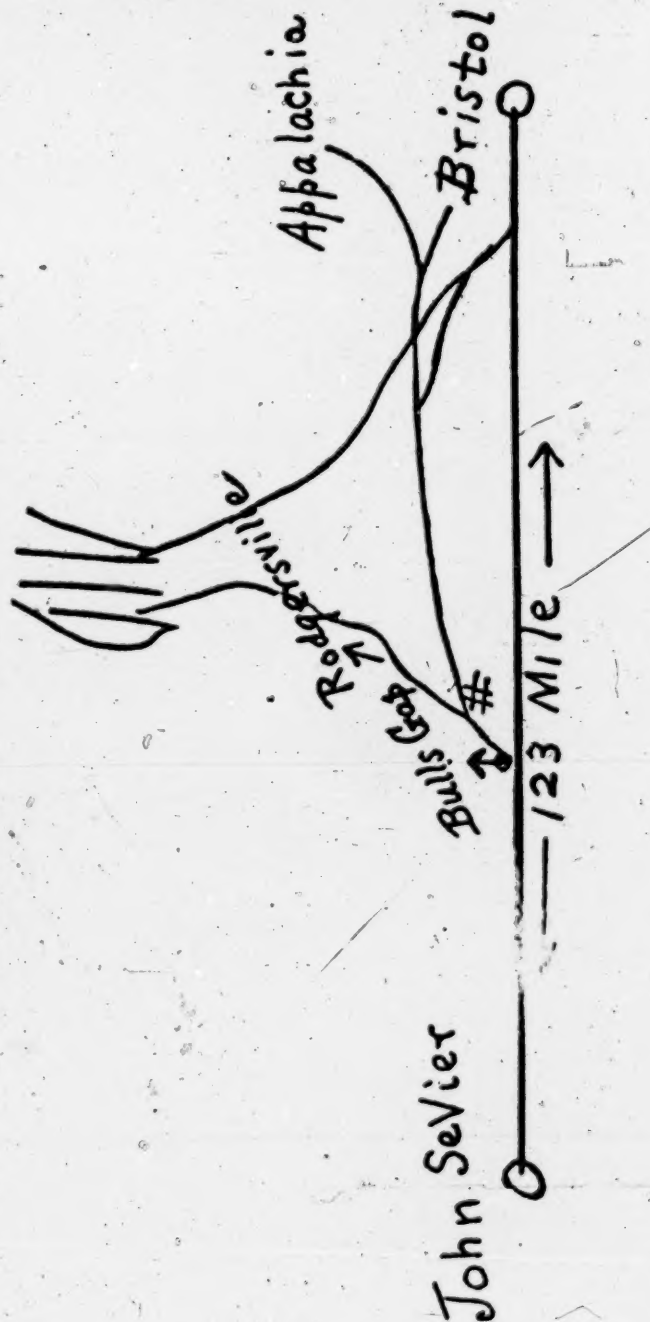
Appeal from Charleston County

returns to its turning point and proceeds thence back over same territory to original starting point, is such a movement "lapback" or "inside turn" within the meaning of the memorandum?

1786

A. - No - see second paragraph of (2) (b). Schedule rules will govern. This question and answer is made without prejudice to respective contentions.

DEFENDANT'S EXHIBIT H



1786

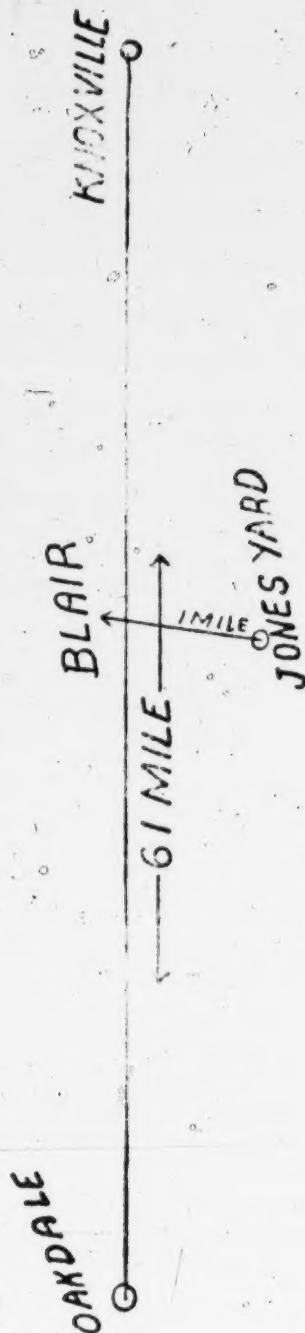
1787

1788

Southern Rwy. Co. v. Order of Rwy. Con. of America

Bulls Gap Yard is located one mile from Bulls Gap Station on the line which leads to Appalachia.

DEFENDANT'S EXHIBIT I



Appeal from Charleston County

DEFENDANT'S EXHIBIT J

SOUTHERN RAILWAY COMPANY

1793

Charleston Division,

Charleston S. C., June 4th, 1944. G

BULLETIN NO. TM-46.

CONDUCTORS AND TRAINMEN:

Effective Monday, June 12, 1944, all local freight service between Charleston and Columbia will be discontinued, and the following local freight service inaugurated:

1794

No. 60 leave Andrews Yard Mondays, Wednesdays, Fridays, at 7:00 A.M. Camp at Branchville, and come on duty at Branchville at 10:30 A.M., on Tuesdays, Thursdays and Saturdays as local west to Andrews Yard.

No. 61 leave Charleston on Tuesdays, Thursdays and Saturdays at 7:45 A.M. Camp at Branchville. Come on duty at Branchville at 10:30 A.M., on Wednesdays, Fridays and Mondays. Run local east to Charleston.

These changes create vacancies, effective Monday, June 12, 1944, for the following:

1795

1 Conductor, 1 Flagman and 1 Brakeman, local freight service between Andrews Yard and Branchville, with Sunday layover Andrews Yard.

1 Conductor, 1 Flagman and 1 Brakeman, local freight service between Branchville and Charleston, with Sunday layover at Branchville.

Qualified applicants desiring these positions will file written application with the undersigned not

1796

Southern Rwy. Co. v. Order of Rwy. Con. of America

later than midnight Friday, June 9, 1944, which is end of the bulletin period.

1797

R. H. Graham,
Trainmaster.

POST - ALL BULLETIN BOOKS.

CY - MR. BIRTHRIGHT:

MR. BUNCH:

MR. BELLINGER:

MR. HARRILL:

MR. ROBERTSON:

MR. CASTLES:

1798

MR. MCDOUGALL:

DEFENDANT'S EXHIBIT K

SOUTHERN RAILWAY COMPANY,

Charleston Division,

Charleston, S. C., June 11, 1944.

BULLETIN NO. TM-47

CONDUCTORS AND TRAINMEN:

1799 The following assignments are made as result of my Bulletins Nos. 45 and 46, June 4th:

Conductor M. K. Lloyd, Flagman T. M. Wimberly and Brakeman D. B. Williams, local freight service between Branchville and Charleston, with Sunday layover at Branchville.

Conductor M. Q. Smith, Flagman V. J. Dukes and Brakeman E. L. Langston, local freight service between Andrews Yard and Branchville, with Sunday layover at Andrews Yard.

1800

A. A. Waltz, Sr., Flagman, Pool Freight Service, with Condr. Jones.

Appeal from Charleston County

P. R. Polatty, Brakeman, Regular Reads Branch Run.

1801

B. W. Varner, Baggage-master, trains 27 and 28, with Condr. Myers.

These assignments create the following vacancies:
Conductor, trains 35 and 36, between Rock Hill and Marion, vacated by M. K. Lloyd.

Flagman, Regular Reads Branch Run, vacated by M. Q. Smith.

Baggage-master, trains 11 and 12, with Condr. Utsey, vacated by B. W. Varner.

1802

Qualified applicants desiring these positions will file written application with the undersigned not later than midnight Friday, June 16, 1944, which is end of the bulletin period.

R. H. Graham,
Trainmaster.

POST - ALL BULLETIN BOOKS.

CY - MR. BIRTHRIGHT:

MR. BUNCH:

MR. BELLINGER:

MR. HARRILL:

MR. ROBERTSON:

MR. CASTLES:

MR. MCDUGALL:

1803

DEFENDANT'S EXHIBIT L

MIMEOGRAPH FORM 100
PREGNALL-HARLEYVILLE REPORT

194

1804

TRAIN _____ ENGINE _____ DATE _____
CONDUCTOR _____ FLAGMAN _____

Southern Rwy. Co. v. Order of Rwy. Con. of America

BRAKEMAN_____

ENGINEER_____ FIREMAN_____

TIME ARRIVED PREGNALL_____M.

TIME LEFT PREGNALL_____M.

NUMBER AND CONTENTS OF CARS IN TRAIN
FOR HARLEYVILLE WHEN ARRIVED PREG-
NALL:

NUMBER AND CONTENTS OF CARS PICKED
UP AT PREGNALL FOR THE PLANT AT HAR-
LEYVILLE:

STATE HOW CARS WERE CLASSIFIED LEAV-
ING PREGNALL FOR THE PLANT, AS FIRST
OUT, SECOND OUT, THIRD OUT, ETC.:

DETAILS OF SWITCHING INVOLVED IN AS-
SEMBLING CARS AT PREGNALL FOR THE
PLANT AT HARLEYVILLE: SHOW JUST WHAT
SWITCHING DONE:

TIME ARRIVED AT THE PLANT AT HARLEY-
VILLE_____M.

Details of switching at Plant, showing moves made,
number of loads and empties placed on each track,
designating the tracks as East or West, and number of

SUPREME COURT

453

Appeal from Charleston County

loads or empties moved out of the Plant from each track:

1809

TIME LEFT THE PLANT AT HARLEYVILLE
_____M.

NUMBER OF CARS MOVED FROM THE PLANT
_____LOADS _____EMPTIES

SHOW CONTENTS OF LOADS MOVED _____ 1810

TIME ARRIVED AT PREGNALL _____M.

DETAILS OF SWITCHING AT PREGNALL, GET-
TING TRAIN TOGETHER FOR MOVEMENT
WEST: _____

TIME LEFT PREGNALL _____M.

SHOW BELOW TOTAL AMOUNT OF DELAY AT 1811
PREGNALL NOT IN CONNECTION WITH MOVE-
MENT TO AND FROM THE PLANT AT HARLEY-
VILLE:

CONDUCTOR

NOTE: It is not necessary to show individual initial
and number of cars on this report.

1812

Southern Rwy. Co. v. Order of Rwy. Con. of America

DEFENDANT'S EXHIBIT M

April 2, 1945.

Mr. J. W. Cox, Assistant Personnel Officer,
Southern Railway System,
Washington, D. C.

Dear Sir:-

Papers attached in the claim of Conductor R. E. Bolehoz, Charleston Division, for 100 miles at local freight rate in addition to service trip for turnaround run Pregnall to Harleyville and return to Pregnall to switch aluminum plant at Harleyville on January 27th, 1945. Which turnaround was made in connection with his straightaway local run between Branchville and Charleston.

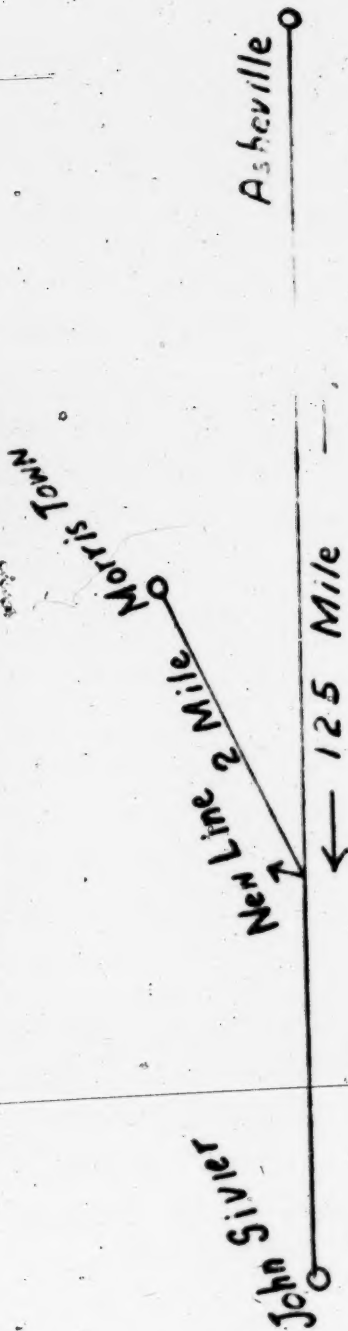
Will you direct payment of the claim or advise if agreeable to disposing of same on basis of Award in Conductor M. K. Lloyd's claim which will be submitted to the Board.

Yours truly.

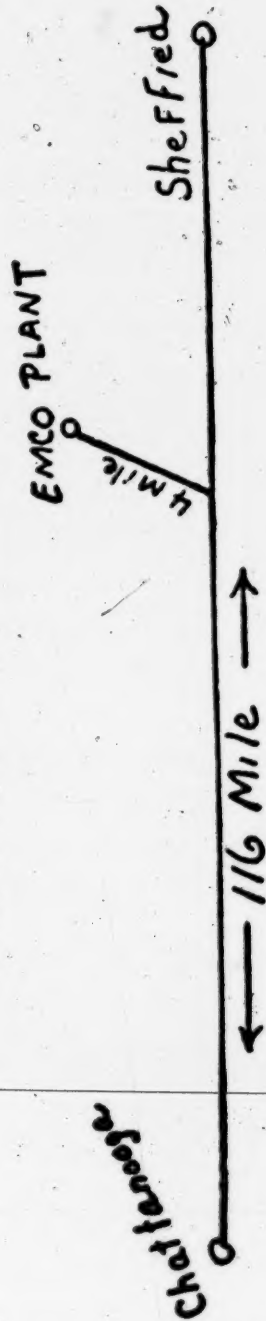
J. T. LAWRENCE, General Chairman,
Order of Railway Conductors,
Southern Railway System.

Appeal from Charleston County

DEFENDANT'S EXHIBIT N



DEFENDANT'S EXHIBIT O



1817

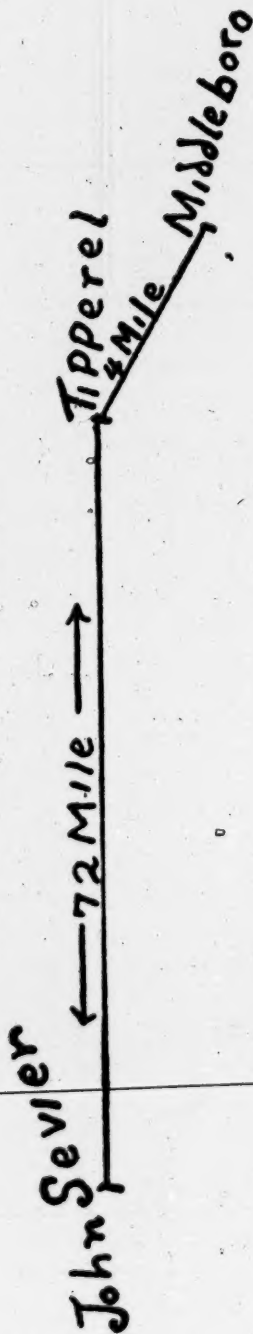
1818

1819

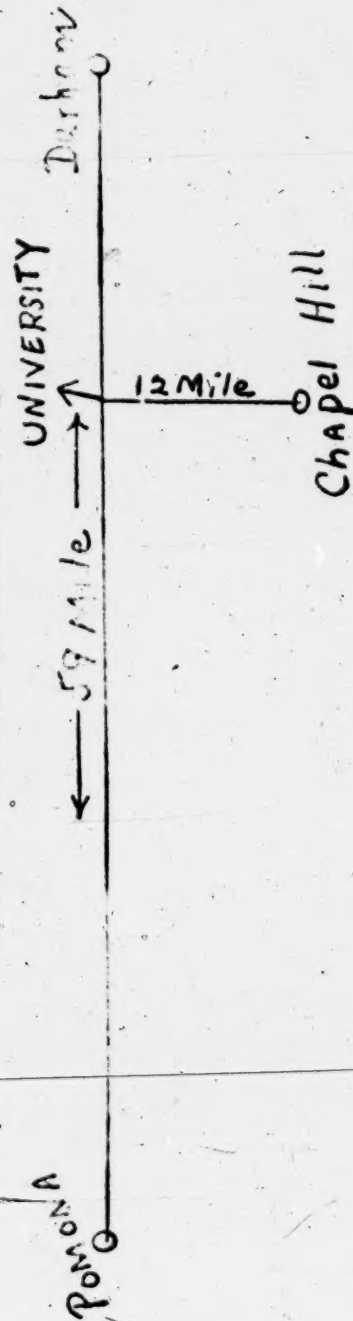
1820

1821

DEFENDANT'S EXHIBIT P



DEFENDANT'S EXHIBIT Q



Appeal from Charleston County

DEFENDANT'S EXHIBIT E

For Identification (Offered in evidence by defendant 1826
and excluded by Trial Judge)

STATE OF ILLINOIS)

: SS

COUNTY OF COOK)

I, T. S. McFARLAND, being first duly sworn state that I am the Executive Secretary of the NATIONAL RAILROAD ADJUSTMENT BOARD, FIRST DIVISION, and as such I am the custodian of and in charge of all of the records of the First Division of said Board; and I do hereby certify that the following papers and documents hereto attached are true and correct copies of the records of said Board in First Division Docket No. 21558: letter of J. T. Lawrence, General Chairman, Order of Railway Conductors, Southern Railway Company, to T. S. McFarland dated November 19, 1945; telegram from C. D. Mackay to T. S. McFarland dated November 23, 1945; letter from C. D. Mackay to T. S. McFarland dated November 26, 1945; letter from T. S. McFarland to J. T. Lawrence dated November 28, 1945; letter from J. T. Lawrence to T. S. McFarland dated November 30, 1945; letter from T. S. McFarland dated December 4, 1945; telegram from J. T. Lawrence to T. S. McFarland dated December 12, 1945; telegram from J. T. Lawrence to T. S. McFarland dated December 29, 1945; telegram from T. S. McFarland to C. D. Mackay and J. T. Lawrence dated December 29, 1945; telegram from C. D. Mackay to T. S. McFarland dated December 29, 1945; telegram from T. S. McFarland to C. D. Mackay dated January 2, 1946; letter from J. A. Raynes to T. S. McFarland dated January 24, 1946; submission of

1826

1827

1828

Southern Rwy. Co. v. Order of Rwy. Con. of America

1829 dispute by Order of Railway Conductors by J. A. Raynes dated January 23, 1946; letter of C. D. Mackay to T. S. McFarland dated January 30, 1946; motion of Southern Railway Company dated January 29, 1946; letter of H. W. Fraser to T. S. McFarland dated January 31, 1946; letter of T. S. McFarland to C. D. Mackay and H. W. Fraser dated February 7, 1946; letter of H. W. Fraser to T. S. McFarland dated April 9, 1946; letter of T. S. McFarland to H. W. Fraser dated April 9, 1946; letter of H. W. Fraser to T. S. McFarland dated April 27, 1946; letter of T. S. McFarland to H. W. Fraser dated June 4, 1946; letter of 1830 C. D. Mackay to T. S. McFarland dated February 21, 1947; and letter from T. S. McFarland to C. D. Mackay dated February 26th, 1947.

I further certify that the foregoing is a full and complete copy and transcript of the records of said Board in First Division Docket No. 21558, that the submission shown by said docket was filed with this Board by the Order of Railway Conductors of America in full compliance with the rules and regulations of this Board and the Railway Labor Act, and that said 1831 docket is presently pending before the First Division of said Board for decision.

IN WITNESS WHEREOF, I have signed and sealed this 11th day of June, 1947.

T. S. McFarland,
Executive Secretary.

Subscribed and sworn to before me this 11th day of June, 1947.

W. C. Frohning
Notary Public in and for Cook County
State of Illinois

1832 (Notarial Seal)

My commission expires July 10, 1947.

Appeal from Charleston County

508 Martin Mill Pike
Knoxville 15, Tennessee
November 19, 1945

1833

Mr. T. S. McFarland, Secretary,
Division 1, National Railroad Adjustment Board,
39 South La Salle Street
Chicago, Illinois.

Dear Sir:

This is to advise you of my intention to file ex parte submission in the following claims on or before December 20th, 1945.

1834

Claims of Charleston Division Conductors as filed by each individual conductor for 100 miles at local freight rate for each date as shown opposite their names in addition to service trip on local freight train 60 and or 61, operated between Charleston, South Carolina, and Branchville, South Carolina, on straight-away basis for turnaround trip from Pregnal, South Carolina, to Harleyville, South Carolina, and return to Pregnal, a distance of 6 and 3/4 miles in each direction.

1835

Conductor M. K. Lloyd, September 7th, and 9th. ~~October 21st, 24th, 26th, 28th, 30th and 31st.~~ November 2nd, 4th, 14th, 16th, 28th and 30. December 2nd, 4th, 7th, 9th, 12th, 14th, 1944. February 20th, 22nd, 27th. March 15th, 17th, 1945.

Conductor T. M. Dukes, December 21st, 23rd, 26th, 28th and 30th, 1944. January 2nd, 1945.

Conductor R. E. Bolchoz, January 27th, 1945.

Conductor I. D. Pooser, March 8th, 1945.

1836

Conductor M. S. Dewitt, June 7th, 21st, 23rd, 26th, 28th. July 12th, 14th, 1945.

Southern Rwy. Co. v. Order of Rwy. Con. of America

1837

I hold power of attorney authorizing the handling of these claims from each individual claimant, which will be forwarded to the Board with the submissions.

Yours truly,

(Signed) J. LAWRENCE

J. T. Lawrence, General Chairman,
Order of Railway Conductors,
Southern Railway Company.

Copy to:

1838

Mr. C. D. Mackay,
Assistant Vice President.

Mr. H. W. Fraser, President,
Order of Railway Conductors

1945 NOV 23 PM 6 40

WA603 CAK-WASHINGTON DC 23 722P
T S MCFARLAND, SECRETARY
FIRST DIVISION NRAB
39 SOUTH LASALLE ST CHICAGO

1839

WE HAVE COPY GENERAL CHAIRMAN LAWRENCE'S LETTER NOVEMBER 19 WITH RESPECT TO CLAIMS CHARLESTON DIVISION CONDUCTORS. FOR YOUR INFORMATION THE MATTER OF VALIDITY OF THESE CLAIMS WILL BE DETERMINED IN A SUIT NOW PENDING BEFORE THE COURT OF COMMON PLEAS OF STATE OF SOUTH CAROLINA CHARLESTON COUNTY. IN THIS SITUATION THE BOARD SHOULD NOT DOCKET THESE CASES BUT AWAIT THE COURT'S DECISION.

1840

C. D. MACKAY

Appeal from Charleston County

SOUTHERN RAILWAY SYSTEM

Operating Department

1841

Washington 13, D. C.

November 26, 1945. ch
C-307

Re: *Southern Railway Company v. Order of
Railway Conductors of America.*

Mr. T. S. McFarland, Secretary,
First Division, National Railroad Adjustment Board,
39 South LaSalle Street,
Chicago, Illinois.

1842

Dear Sir:

Supplementing my telegram of November 23, 1945, relative to certain claims of our Charleston Division Conductors.

On July 12, 1945, suit for declaratory judgment was instituted by the Southern Railway Company in the Court of Common Pleas of Charleston County, South Carolina, by the service of a summons and complaint. This suit was instituted to test the validity of the claims Mr. Lawrence is not attempting to have the First Division docket and decide. On July 25, 1945, the defendant, Order of Railway Conductors, filed a Petition to Remove the case from the Court of Common Pleas to the United States District Court for the Eastern District of South Carolina, and the Southern Railway filed a Motion to Remand. Argument on the Motion to Remand was heard on October 30, 1945, and the District Court in an opinion by Judge Waring remanded the case to the Court of Common Pleas. A copy of the District Court's opinion is attached

1843

1844

Southern Rwy. Co. v. Order of Rwy. Con. of America

1845 hereto, which opinion clearly shows that the Adjustment Board and the courts have concurrent jurisdiction, and that the Adjustment Board should not take jurisdiction of the case when it is before a court. Therefore, as stated in my telegram, the Board should not docket these cases but should await the decision of the Court of Common Pleas.

Yours very truly,

(Signed) C. D. MACKAY
Assistant Vice President

1846

November 28, 1945.

Mr. J. T. Lawrence, General Chairman
Order of Railway Conductors of America
508 Martin Mill Pike
Knoxville 15, Tennessee

Dear Sir:

1847 Your notice letter of the 19th instant certifies your intention of filing for Conductor M. K. Lloyd and four other Conductors whose names are mentioned in the letter, claims for 100 miles each at local freight rate for a number of dates as indicated.

You sent Mr. C. D. Mackay, Assistant Vice President of the Southern Railway Company a copy of your letter and he has protested by telegram of November 23d, and his letter of November 26th, the acceptance of these claims but it is not indicated that you were given either a copy of the telegram or Mr. Mackay's letter.

1848

It is the Carrier's contention that these claims should not be accepted by the Division because of a law suit instituted by the Carrier styled Southern Railway

Appeal from Charleston County

Company, Plaintiff versus Order of Railway Conductors of America, Defendant, and designated as Civil No. 1367. 1849

It is the policy of the Division that where there is a dispute with respect to a question of taking jurisdiction in a case for any argument with respect to jurisdiction to be presented along with the merits of the case.

It is the purpose of this letter to ascertain from you whether or not,

- 1.) in your opinion, the case cited by Mr. Mackay is the same as that making up the claims covered by your notice letter; and, 1850
2. Are you willing to withdraw your notice letter and await the decision of the Court as has been suggested by Mr. Mackay would be the proper procedure?

Yours very truly,

T. S. McFarland,
Secretary

TSM :dls

Knoxville, Tennessee 1851
November 30th, 1945

Mr. T. S. McFarland, Secretary,
National Railroad Adjustment Board, 1st. Division,
39 LaSalle St.,
Chicago 3, Illinois.

Dear Sir:-

Referring to your letter of November 28th, in reference to my notice of filing ex parte claims as referred to therein, copy of which was furnished Assistant Vice President Mackay of the Southern Railway Company. 1852

Southern Rwy. Co. v. Order of Rwy. Con. of America

1853 As the claims were filed by the individual conductors, for whom I hold Power of Attorney to prosecute same, and I am acting under the advice of President Fraser and the Chief Counsel of the Order, as the suit as filed by the Southern Railway Company was against the Order of Railway Conductors, and not the individual claimants.

1854 While I have received nothing from Assistant Vice-President Mackay relative to his telegram of November 23rd, nor his letter of November 26th, protesting the acceptance of such claims by the Board. However, I am not surprised at such action, as I had no information of Mr. Mackay's intention of filing suit for declaratory judgment to prevent claims from being filed and handled under the Railroad Labor Act, until receiving copy of brief filed and served on Local Chairman, E. O. Utsey at 1:30 P.M., July 12, 1945, as agent representing O.R.C. of Charleston Division, of the Southern Railway Company—which notice was served on him by Sheriff of Charleston County, S. C.

1855 As to your Question No. 1: I do not have the number of the Civil suit. As to Question No. 2: I am unwilling to withdraw the notice letter, as suggested by Mr. Mackay, as I am handling as advised by the Chief Counsel.

Yours very truly,

(Signed) J. LAWRENCE

J. T. Lawrence, General Chairman,
Order of Railway Conductors of America,
Southern Railway System.

Appeal from Charleston County

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

1857

39 South LaSalle Street, Chicago 3, Illinois
Andover 1050

December 4, 1945

Mr. C. D. Mackay, Assistant Vice President
Southern Railway Company
Washington 13, D. C.

Dear Sir:

1858

In the letter of November 19, 1945, the General
Chairman (men) representing the—

ORDER OF RAILWAY CONDUCTORS

on your railroad, served notice of intention to file ex
parte submission (s) in claim (s) as explained in the
letter, copy of which it is indicated was sent to the
Management.

You are requested in accordance with Circular No.
1 to file by January 3, 1946, fifteen (15) copies of
the Management's submission (s) in the ex parte
case (s).

1859

It is assumed—

(1) That the statement of claim shown in the sub-
missions of both the Management and the Committee
will be identical with that shown in the notice letter;

(2) That as provided in Circular No. 1 the submis-
sions from both the Carrier and Committee will af-
firmatively show that all data submitted in support of
their respective positions have been presented each to
the other and made a part of the particular questions
in dispute; and

1860

Southern Rwy. Co. v. Order of Rwy. Con. of America

(3) That oral hearing is either waived or desired.

1861

Very truly yours,

T. S. McFarland, Secretary.

Copy of notice letter is attached.

TSM:dls

Attachment

cc: Mr. H. W. Fraser

Mr. J. T. Lawrence

1862

KVA5 DL PD 2 EXTRA-KNOXVILLE, TENN

12 80 A

1945 DEC 12 AM 8 21

T S MCFARLAND

SECTY DIVN 1 NATL RR ADJUSTMENT BOARD
39 SOUTH LASALLE ST CHICAGO

REFER TO NOTICE LETTER NOVEMBER 19TH
YOUR LETTER NOVEMBER 28TH I REQUEST
EXTENSION OF THIRTY DAYS FOR FILING
SUBMISSION WITH THE BOARD ANSWER
WESTERN UNION.

1863

J T LAWRENCE GENL CHAIRM SOU Rwy.

KVA 21 DL PD-KNOXVILLE TENN 29 855A

T S MCFARLAND-SEC DIV 1 NATIONAL
RAILROAD ADJUSTMENT BOARD

39 SOUTH LASALLE ST CHGO

1864

REFERRING TO FORMER TELEGRAM AND
NOTICE LETTER NOVEMBER 19 IN REGARD
TO CLAIMS COVERED THERE IN AND YOUR
LETTER DECEMBER 4 TO ASSISTANT VICE
PRESIDENT MACKAY SOUTHERN RAILWAY
STOP OWING TO ILLNESS AND RETIREMENT
EXTENSION OF TIME FOR FILING TO FEBRU-

SUPREME COURT

467

Appeal from Charleston County

ARY 3, 1947 IS REQUESTED ANSWER WEST-
ERN UNION.

1865

J P LAWRENCE GENERAL CHAIRMAN
508 MARTINMILL.

12-29-45

DAY LETTER RUSH DECEMBER 29, 1945
MR. C. D. MACKAY, ASSISTANT
VICE PRESIDENT
THE SOUTHERN RAILWAY SYSTEM
WASHINGTON, D. C.

MR. J. T. LAWRENCE, GENERAL CHAIRMAN
ORDER OF RAILWAY CONDUCTORS OF
AMERICA

1866

508 MARTIN MILL PIKE

KNOXVILLE 15, TENNESSEE

DUE DATE NOW FEBRUARY 2, 1946 LAWRENCE
NOTICE LETTER NOVEMBER 19.

T. S. MC FARLAND
SECRETARY

TSM:dls

Charge: Gov't Rate

Nat'l RR Adjustment Board

39 S. La Salle Street Chicago 3

1867

1945 DEC 29 PM 1.00

WA880 CAK-WASHINGTON DC 29 150P

T S MCFARLAND, SECRETARY

FIRST DIVISION

NATIONAL RAILROAD ADJUSTMENT BOARD

39 SOUTH LASALLE ST CHICAGO

RETEL AM I CORRECT IN UNDERSTANDING
YOU HAVE REFERENCE TO CLAIMS OF
CHARLESTON DIVISION CONDUCTORS AC-

1868

Southern Rwy. Co. v. Order of Rwy. Con. of America

COUNT SERVICE PERFORMED PREGNALL,
S. C.?

1869

C. D. MACKAY.

(Received Jan 2-A.M.)

DAY LETTER RUSH JANUARY 2, 1946
MR. C. D. MACKAY, ASS' STANT
VICE PRESIDENT
SOUTHERN RAILWAY SYSTEM
WASHINGTON 13, D. C.

1870

RETEL 29 OUR WIRE 29 REFERRED TO NOTICE
LETTER NOVEMBER 19 FROM GENERAL
CHAIRMAN LAWRENCE IN CLAIM OF CON-
DUCTOR LLOYD ET AL FIRST DUE JANUARY
3 NOW DUE FEBRUARY 2.

T S McFARLAND
SECRETARY

TSM:dls

Charge: Gov't Rate

Nat'l RR Adjustment Board

39 S LaSalle St Chicago 3

1871

1872

Appeal from Charleston County

**ORDER OF RAILWAY CONDUCTORS
OF AMERICA**

1873

General Committee of Adjustment
SOUTHERN RAILWAY SYSTEM

Danville, Ky.

January 24, 1946

J. A. Raynes, Chairman
241 E. Main St.
Tele. 980

Mr. T. S. McFarland, Secretary
National Railroad Adjustment Board
39 South LaSalle Street
Chicago, Illinois

1874

Dear Sir:

Please be referred to letter dated November 19, 1945 from former General Chairman J. T. Lawrence and also his telegram dated December 29th wherein request was made to you for an extension of filing time in the claim of Charleston Division Conductors as set out in Mr. Lawrence's letter of November 19, 1945.

1875

I am mailing to you fifteen copies of submission in the above subject matter, under separate cover.

Yours very truly,

(Signed) J. A. RAYNES

J. A. Raynes, Gen'l Chairman
Conductors Committee
Southern Railway System

1876

Southern Rwy. Co. v. Order of Rwy. Con. of America

ORDER OF RAILWAY CONDUCTORS
OF AMERICA

Office of the General Chairman
Southern Railway

241 East Main Street
Danville, Kentucky
January 23, 1946

First Division
National Railroad Adjustment Board
39 LaSalle Street
Chicago 3, Illinois

PARTIES TO DISPUTE:

ORDER OF RAILWAY CONDUCTORS
SOUTHERN RAILWAY COMPANY

Statement of Claims: Claims of Charleston Division conductors as filed by each individual conductor for pay for 100 miles at local freight rate for each date shown after their names in addition to pay for service trip on local freight trains 60 and/or 61 operated between Charleston, South Carolina and Branchville, South Carolina on straightaway basis for being required to make a side trip from Prenal, South Carolina to Harleyville, South Carolina and return to Prenal; a distance of 6-3/4 miles in each direction or 13 1/2 miles for round trip movement:

Conductor M. K. Lloyd, September 7 and 9; October 21, 24, 26, 28, 30, and 31; November 2, 4, 14, 16, 28, 30; December 2, 4, 7, 9, 12, 14, 1944; February 20, 22, 27; March 15 and 17, 1945.

Conductor T. M. Dukes, December 21, 23, 26, 28, 30, 1944; July 2, 1945.

Conductor R. E. Bolehoz, January 27, 1945.

Appeal from Charleston County

Conductor I. D. Pooser, March 8, 1945.

Conductor M.S. DeWitt, June 7, 21, 23, 26, 28; July 12, 14, 1945. 1881

And all subsequent trips; also claim for all other conductors who performed like service on subsequent dates.

Employes' Statement of Facts: Prior to June 12, 1944, trains 60 and 61 were operated between Charleston, South Carolina and Andrews Yard (Columbia, South Carolina) daily or tri-weekly and so appear in the carrier's current time table just as they did in 1935. While on June 12, 1944, trains 60 and 61 were changed to operate as shown in Bulletin TM 46, issued June 4, 1944, advertising trains 60 and 61, and assigning the runs as required by the rules. Assignment under Bulletin TM 47, June 11, copy of Bulletin being attached as Exhibits "A" and "B", assignments being effective June 12 when the present operation started. 1882

Position of Employees: The schedule of wages, rules and regulations between the Committee of the Order of Railway Conductors, and Carrier, contain the following provisions: 1883

"Freight Service"

Article 5-A

BASIC DAY

"In all road service except passenger, 100 miles or less, 8 hours or less (straightaway or turnaround) shall constitute a day's work; miles in excess of 100 will be paid for at the mileage rates provided, except as provided for in Article 28." (Article 28 not involved.) 1884

Southern Rwy. Co. v. Order of Rwy. Con. of America

On dates for which the individual conductors filed claims for pay for 100 miles at local freight rates, in addition to pay for their service trip, they were required to make a side trip from Pregnal, South Carolina, an intermediate station or point on carrier's line, to Harleyville, South Carolina and return to Pregnal, South Carolina then complete their service trip on 61 to Branchville, South Carolina or Charleston, South Carolina on train 60.

The side trip from Pregnal, South Carolina, an intermediate point or station on carrier's line between Charleston, South Carolina and Branchville, South Carolina was not included nor provided for in the advertisement and assignment of trains 60 and 61; therefore, under then language of Article 5-A, Bulletin TM 46, dated June 4, 1944, definitely established straightaway service between Charleston, South Carolina and Branchville, South Carolina. The carrier in the instant case is attempting to apply the rule straightaway and turnaround (instead of straightaway or turnaround) which the Committee contends cannot be done as the carrier has the right to do either but not both. It is the further position of the Committee that runs must be operated as provided in the rule either straightaway or turnaround, for the reason that there is no rule or provision in Conductors' Schedule providing for or permitting the carrier to make side trips or turnaround in connection with straightaway runs.

Harleyville is not on carrier's line and the operation between Pregnal, South Carolina, and Harleyville, South Carolina is neither operated nor governed by train order movements nor yard limit movements, but by work instructions issued by chief dispatcher, copy of which is attached for June 26, 1945 as Exhibit "C".


Appeal from Charleston County

Oral protest was made when this operation was started by the locally interested people. The superintendent requested that claims be held up until he could **secure a ruling**, which was done, the first claim having been filed June 13, 1944. In the meantime, the superintendent was called into the armed forces being succeeded by another superintendent who evidently had no knowledge of these pending claims. When local chairman presented these claims December 19, 1944, he was notified by the superintendent on January 17, 1945 that all claims more than sixty days old were barred from handling under Article 32 of the Schedule, except those of September 7 and 9, 1945 which had been appealed to the General Chairman.

The Board's attention is directed to the answer to the dissenting opinion of the carrier members of the Board by Judge Lief Erickson on the meaning of language in Article 5-A as interpreted by him in Awards 8445 and 8446 as the meaning of the word "or" in Article 5, which is the rule involved in the instant claims, also to Awards 481, 5378, 8257, 8876, and 10873.

The claims should be sustained under the rule as quoted and for the reasons shown, and we request the board to so decide. All data contained herein have been submitted to the carrier by correspondence and/or discussed in conference with the designated officer of the carrier, but no settlement reached.

J. A. Raynes, Gen'l. Chairman
Order of Railway Conductors
Southern Railway

Encl: 

Southern Rwy. Co v. Order of Rwy. Con. of America

Exhibits "A"; "B"; "C"; "D"

1893

Exhibit "A" attached is not reprinted, being the same Bulletin No. TM-46 dated June 4th, 1944, already printed above as Defendant's Exhibit "J".

Exhibit "B" attached is not reprinted, being the same Bulletin No. TM-47 dated June 11, 1944, already printed above as Defendant's Exhibit "K".

EXHIBIT "C"

Charleston, S.C., June 25, 1945

1894

Condr. Local West (No. 61) June 26th

Engr. Local West (No. 61) June 26th

Mr. Birthright, Mr. Graham, Mr. Hutto, Mr. Ackerman, Dispatchers

Local West (No. 61) June 26th; go to Harleyville, move loads from Pregnal for Harleyville and place at Plant. Move all empties from Harleyville and get billing at St. Georges. Maximum speed between Pregnall and Harleyville Plant . . . 20 miles per hour, except

1895

reduce speed to ten miles per hour around the two curves between Harleyville and the Plant. These speed restrictions apply both directions.

Get usual order at Dorchester.

If you have any empty system box cars, apply on orders and leave surplus at Branchville. If any foreign boxes, use what you need to apply on orders and leave surplus at Branchville, billing surplus miscellaneous foreign empty boxes to COLUMBIA on Order 505. If any empty low side gonds with solid ends, bill

1896

to MASCOT, TENN., on ORDER 815.

Appeal from Charleston County

If any flat bottom coal cars moved from Harleyville, use them to apply on orders and leave surplus at Branchville. 1897

If any empty gondos with drop ends, bill to COLUMBIA.

Classify train leaving Pregnall as follows:

3 cars Stone First out.

Be sure to prepare mimeographed form 100 to cover this trip.

C. O. Lineberger,

Chief Train Dispatcher

Copy: H. L. Bradford, BV. 1898

C. D. Mackay,
Asst. Vice-Pres.
C. H. Dugan,
Asst. to Vice-Pres.
R. P. Travis,
Personnel Officer
J. W. Cox,
Asst. Personnel Officer

A. J. Millan,
Supt. Joint Facilities
L. G. Tolleson,
Asst. to Pers. Officer
R. W. Hawkins,
Chief Time Inspector
R. A. DeRossett,
Personnel Assistant

SOUTHERN RAILWAY SYSTEM

Operating Department

Washington 13, D. C.

January 30, 1946. 1899

Mr. T. S. McFarland, Secretary,
First Division, National Railroad
Adjustment Board,
39 South LaSalle Street,
Chicago 3, Illinois.

Dear Sir:

I am sending herewith by registered mail a copy of Southern Railway Company's motion, signed by me, in answer to notice of December 4, 1945, by you, of intent of Mr. J. T. Lawrence, General Chairman of the Order of Railway Conductors of America, to file with the First Division an ex parte submission, within 1900

Southern Rwy. Co. v. Order of Rwy. Con. of America

1931 thirty days from December 4, 1945, time extended to February 2, 1946, covering a dispute in the matter identified as:

1932 "Claims of Charleston Division Conductors as filed by each individual conductor for 100 miles at local freight rate for each date as shown opposite their names in addition to service trip on local freight train 60 and or 61, operated between Charleston, South Carolina, and Branchville, South Carolina, on straightaway basis for turn-around trip from Pregnall, South Carolina, to Harleyville, South Carolina, and return to Pregnall, a distance of 6 and $\frac{3}{4}$ miles in each direction.

"Conductor M. K. Lloyd, September 7, and 9th. October 21st, 24th, 26th, 28th, 30th and 31st. November 2nd, 4th, 14th, 16th 28th and 30th. December 2nd, 4th, 7th, 9th, 12th, 14th, 1944. February 20th, 22nd, 27th. March 15th, 17th, 1945.

"Conductor T. M. Dukes, December 21st, 23rd, 26th, 28th and 30th, 1944. January 2nd, 1945.

1933 "Conductor R. E. Bolchoz, January 27th, 1945.

"Conductor I. D. Pooser, March 8th, 1945.

"Conductor M. S. Dewitt, June 7th, 21st, 23rd, 26th, 28th, July 12th, 14th, 1945."

The other fourteen copies of this motion, which the Board requires, are being sent today by regular mail at the same time as this.

1934 Also enclosed is a copy of the opinion of Judge J. Waties Waring of the United States District Court for the Eastern District of South Carolina, dated October 30, 1945, which is attested by the clerk of that court, for the regular docket file. A copy of this decision is

Appeal from Charleston County

attached to each of the fifteen copies of our Motion as Carrier's Exhibit "G".

Yours very truly,

C. D. MACKAY (Signed),

Assistant Vice President.

MOTION TO DISMISS FOR WANT OF
JURISDICTION

BY

SOUTHERN RAILWAY COMPANY

BEFORE THE FIRST DIVISION, NATIONAL RAILROAD ADJUSTMENT BOARD IN THE MATTER OF CLAIM PROPOSED TO BE FILED ON BEHALF OF M. K. LLOYD, T. M. DUKES, R. E. BOLCHOZ, I. D. POOSER, AND M. S. DEWITT BY THE ORDER OF RAILWAY CONDUCTORS OF AMERICA.

Comes now the Southern Railway Company in answer to notice of December 4, 1945, by Secretary T. S. McFarland, First Division, National Railroad Adjustment Board, of intent of Mr. J. T. Lawrence, General Chairman of the Order of Railway Conductors of America, to file with said Board an ex parte submission, within thirty (30) days from December 4, 1945, time extended to February 2, 1946, covering a dispute in the matter identified as:

"Claims of Charleston Division Conductors as filed by each individual conductor for 100 miles at local freight rate for each date as shown opposite their names in addition to service trip on local freight train 60 and or 61, operated between

Southern Rwy. Co. v. Order of Rwy. Con. of America

1909 Charleston, South Carolina, and Branchville, South Carolina, on straightaway basis for turn-around trip from Pregnall, South Carolina, to Harleyville, South Carolina, and return to Pregnall, a distance of 6 and $\frac{3}{4}$ miles in each direction.

"Conductor M. K. Lloyd, September 7, and 9th. October 21st, 24th, 26th, 28th, 30th and 31st. November 2nd, 4th, 14th, 16th, 28th and 30th. December 2nd, 4th, 7th, 9th, 12th, 14th, 1944. February 20th, 22nd, 27th. March 15th, 17th, 1945.

1910 "Conductor T. M. Dukes, December 21st, 23rd, 26th, 28th and 30th, 1944. January 2nd, 1945.

"Conductor R. E. Bolchoz, January 27th, 1945.

"Conductor I. D. Pooser, March 8th, 1945.

"Conductor M. S. Dewitt, June 7th, 21st, 23rd, 26th, 28th, July 12th, 14th, 1945."

The Southern Railway Company hereby appears specially and solely for the purpose of submitting this petition to dismiss for want of jurisdiction for the following reasons:

1911 An action for a declaratory judgment was commenced by the Southern Railway Company, a Virginia Corporation, against the Order of Railway Conductors of America, a voluntary unincorporated association, under the provisions of sections 660, 7796, 7797, and 7798 of the Code of Laws of South Carolina, 1942, in the Court of Common Pleas for Charleston County, South Carolina, on or about July 12, 1945. The plaintiff Southern Railway Company, as stated in its complaint, a copy of which is attached hereto and made a part hereof as Carrier's Exhibit A, is seeking a declaratory judgment or decree by the Court of Common Pleas for Charleston County, South Carolina, regard-

1912

Appeal from Charleston County

ing the rights and obligations of the Southern Railway Company and the Order of Railway Conductors of America in respect to certain work performed at Pregnall, South Carolina, which is the identical dispute that the Order of Railway Conductors is presently trying to have this Board decide. 1913

On or about July 25, 1945, the Order of Railway Conductors of America served on the Southern Railway Company a Petition for Removal to the United States District Court for the Eastern District of South Carolina, alleging as ground for removal that the suit was one arising under the Constitution and laws of the United States in that it involved the federal question as to whether the plaintiff may maintain the suit in view of the provisions of the Railway Labor Act of 1934, as amended. A copy of the Petition for Removal is attached hereto and made a part hereof as Carrier's Exhibit B. Also, with the Petition for Removal, the Order of Railway Conductors filed an answer in the Court of Common Pleas for Charleston County, which answer is identical to the one filed in the Federal District Court with the exception that in the latter there is an additional Article (No. 20) setting up the defense that a declaratory judgment would not necessarily be binding on the individual conductors. Copies of the Answer filed in the Court of Common Pleas and in the United States District Court are attached hereto and made a part hereof as Carrier's Exhibit C, and Carrier's Exhibit D, respectively. 1914 1915

The Southern Railway Company in answer to the Petition for Removal filed in the United States District Court a Motion to Remand, and a Notice of Motion to Amend the Motion to Remand, asserting three reasons why the case should be remanded to the Court 1916

Southern Rwy. Co. v. Order of Rwy. Con. of America

1917 of Common Pleas for Charleston County, South Carolina. The reasons were: (1) That no federal question was disclosed by plaintiff's complaint and defendant could not by its petition, answer, or defense, inject any such question for the purpose of removal; (2) That the suit did not arise under the Constitution or under the laws of the United States; and, (3) That the cause of action as set out in the Complaint involved no dispute or controversy respecting the validity, construction or effects of the Constitution or of any laws of the United States. Copies of the Motion to Remand and the Notice of Motion to Amend the Motion to Remand
1918 are attached hereto and made a part hereof as Carrier's Exhibits E and F, respectively.

The argument on the Motion to Remand the case from the United States District Court for the Eastern District of South Carolina to the Court of Common Pleas for Charleston County was made on October 30, 1945, before Judge J. Waties Waring of that federal court. Upon conclusion of the argument the court remanded the case to the Court of Common Pleas. A copy of the opinion, which is dated October 31, 1945,
1919 is attached hereto and made a part hereof as Carrier's Exhibit G, and one copy attested by the clerk of the court being sent with letter of transmittal to Secretary McFarland. It should be noted that the opinion states, among other things:

"I am of the opinion that if the matter is taken first before a court it will retain jurisdiction and carry the case through to an adjudication. If, however, the Board has taken jurisdiction the court will not interfere."

1920 Since the remand of this case the Order of Railway Conductors of America have filed in the Court of Com-

Appeal from Charleston County

mon Pleas for Charleston County, South Carolina, a Motion to Amend its Answer which was originally filed in that court so that it would conform with the answer filed in the United States District Court. That is, the answer as amended, with the approval of the Court of Common Pleas for Charleston County, now contains an Article 20, following Article 19, which is the same as the Article 20 of the Answer filed in the federal court. (See Article 20 in Carrier's Exhibit D). Further, on December 26, 1945, the Order of Railway Conductors of America filed a Notice of Grounds of Oral Demurrer in the Court of Common Pleas in and for Charleston County. A copy of the latter notice is attached hereto and made a part hereof as Carrier's Exhibit H. It is believed that it is quite possible, and this Carrier desires, that the trial of this case will be set during the approaching term of the Court of Common Pleas for Charleston County, which term ends the last week in February, 1946. The argument on the Demurrer should be at the time when the case is called for trial.

Because of the above facts the First Division is without authority to decide the above mentioned claims presented to it by the Order of Railway Conductors of America, and should therefore dismiss the case for want of jurisdiction. Further, the legal authorities hereafter cited clearly show that the Board should not take jurisdiction of a case similar to this one.

It has been clear since the decision by the United States Supreme Court in *Moore v. Illinois Central Railroad Company* (1941) 312 U. S. 630, 61 S. Ct. 754, 85 L. Ed. 1089, that a carrier or an employee may institute proceedings in court without exhausting the remedies set up by the Railway Labor Act. In that

Southern Rwy. Co. v. Order of Rwy. Con. of America

1935 case a member of the Brotherhood of Railroad Trainmen brought suit for damages against the railroad alleging a wrongful discharge contrary to the terms of the contract between the railroad and the Trainmen. Therein the contention was made that the action was premature because of failure to exhaust the administrative remedies granted under the Railway Labor Act. The Supreme Court in its opinion said:

1935 “ * * * It is to be noted that the section pointed out, § 153 (i), as amended in 1934, provides no more than that disputes ‘may be referred’ * * * to the * * * Adjustment Board * * * . It is significant that the comparable section of the 1926 Railway Labor Act (44 Stat. 577, 578) had, before the 1934 amendment, provided that upon failure of the parties to reach an adjustment a ‘dispute shall be referred to the designated Adjustment Board by the parties, or by either party’ * * * . This difference in language, substituting ‘may’ for ‘shall,’ was not, we think, an indication of a change in policy, but was instead a clarification of the law’s original purpose. For neither the original 1926 Act, nor the Act as amended in 1934, indicates that the machinery provided for settling disputes was based on a philosophy of legal compulsion. On the contrary, the legislative history of the Railway Labor Act shows a consistent purpose on the part of Congress to establish and maintain a system for peaceful adjustment and mediation voluntary in its nature. The District Court and the Circuit Court of Appeals properly decided that petitioner was not required by the Railway Labor Act to seek adjustment of his con-

Appeal from Charleston County

troversy with the railroad as a prerequisite to suit for wrongful discharge. • • •

1932

In *Adams v. New York, C. & St. L. R. Co.*, 121 Fed. (2) 808, action was brought against the defendant railroad for declaratory judgment defining the plaintiff's seniority rights as railroad employee. The serious question was whether the Railway Labor Act provided for an exclusive remedy depriving "the Federal District Court of jurisdiction which it otherwise would have had under the diversity of citizenship statute" (page 809). In its opinion As Modified On Motion to Dismiss Appeal the Court stated:

1930

"Upon the merits, in view of the decision of the United States Supreme Court, in *Earl Moore v. Illinois Central Railroad Company*, 61 S. Ct. 754, 85 L. Ed. . . ., decided March 31, 1941, the order of the District Court sustaining the defendant's motion to dismiss plaintiffs' complaint, was erroneous; the complaint should stand. In view of the Supreme Court's clarifying language as to the intended scope of the Railway Labor Act, 45 U. S. C. A. § 151 *et seq.*, we can definitely state that the employees' action may be brought, at their election, either in a court, or settled by the administrative remedies prescribed by said Act."

1931

(Emphasis supplied unless otherwise indicated.)

The Supreme Court of Georgia said in *Evans et al. v. Louisville & N. R. Co. et al.*, 191 Ga., 395, 12 S. E. (2d), 611, 614:

"• • • It is contended under this provision that the National Railroad Adjustment Board is vested with exclusive jurisdiction over disputes between employees and the carrier as to seniority

1932

Southern Rwy. Co. v. Order of Rwy. Con. of America

rights or at least that the complaining employee or employees must, before resorting to the courts, first exhaust the remedies afforded by this provision. *This contention is untenable.* The present action is one to enforce certain alleged rights under a contract and does not involve or arise out of any order of the National Railroad Adjustment Board, and the above provision does not purport in such case to prevent recourse to the courts in the first instance. * * *

See to the same effect *Berryman v. Pullman Co.* (D. C.—W. D., Mo.) 48 Fed. Supp. 542; *Austin v. Southern Pac. Co.* (Cal.), 50 C. A. (2) 432, 123 P. (2) 39; and *Oil Workers Inter. Union, etc. v. Texoma Nat. Gas Co.* (1945) 146 Fed. (2d) 62. (Cert. denied 65 S. Ct. 1017).

In *The Delaware, Lackawanna & Western Railroad Company v. Slocum* an action for a declaratory judgment was brought in the Supreme Court of the State of New York, County of Chemung, by that railroad for the construction of certain contracts between the railroad and two labor organizations. The Telegraphers Organization, one of the defendants, filed a petition to remove the case to the United States District Court for the Western District of New York. The New York Supreme Court, County of Chemung, refused to grant the removal. The opinion, reported in 50 N. Y. S. (2) 313, 183 Misc. 454, stated, *inter alia*, through Judge Personius:

"We hold that the cause of action alleged does not come under the Railway Labor Act. The action is for a construction of the contract between the parties. It does not arise under any law regulating commerce. Title 28 U. S. C. A. § 41(8). It does not grow out of any disputes concerning rates

Appeal from Charleston County

of pay, rules or working conditions. Title 45 U. S. C. A. §§ 151a and 153 (i)."

1907

In spite of the decision of that court the United States District Court for the Western District of New York approved the Telegrapher's bond on removal. The plaintiff made a motion to remand. The motion to remand to the state court was granted. In its opinion, 56 Fed. Supp. 634, the District Court said in part:

"The motion papers set forth as their basis the single ground that this court is without jurisdiction because of the provisions of the Railway Labor Act, as amended June 21, 1934 (45 U.S.C.A. § 151 First Division (i)).

1938

"* * * (1) *Moore v. Illinois Cent. R. Co.*, 312 U. S. 630, 61 S.Ct. 754, 756 L.Ed. 1089, settled the question of the necessity of invoking the afore-said provisions of the Railway Labor Act as a prerequisite to an action. * * *"

Further the opinion stated:

"The defendant Slocum has upon these motions submitted three extensive briefs. These are largely concerned with the necessity of recourse by the plaintiff to the Railway Act *and the effect of the failure to proceed under it on the administration of the Act*. As hereinbefore pointed out, the instant action is simply one to declare the meaning of certain contracts. *However worthwhile procedure under the Railway Labor Act may be, no law makes it compulsory and no law denies the jurisdiction of the state court.*"

1939

After the cause was sent back to the state court the defendant asked the court to exercise its discretion and

1940

Southern Rwy. Co. v. Order of Rwy. Con. of America

1941 refuse a declaratory judgment on the ground that the question in dispute should be decided by the National Railroad Adjustment Board. The court, through Judge Newman, opinion not reported, denied the defendant's motion. On appeal to the New York Supreme Court, Appellate Division, the opinion was affirmed. This last decision, reported in 57 N.Y.Supp. 65, stated, among other things:

1942 "It has been decided that although the Railroad Labor Act permits controversies arising under employment contracts to be determined before the National Railroad Adjustment Board at Chicago, Ill., this does not deprive state courts of jurisdiction. (*Moore v. Illinois Central R. Co.*, 312 U. S. 630, 61 S.Ct. 754).

1943 "An action for a declaratory judgment may be maintained although a statutory method is provided for determining the controversy sought to be litigated. (*German Masonic Temple Ass'n. v. City of New York*, 279 N.Y. 452). A real controversy exists under the contracts. *The courts of this state furnish a more convenient forum for the trial of the issues than the statutory Board which functions in a distant state. Under such conditions, plaintiff should not be denied the right to litigate here and obtain a judgment declaratory of its obligations under the contracts.* (*Rockland Light & Power Co. v. City of New York*, 239 N.Y. 45; *Woollard v. Schaffer Stores Co.*, 272 N.Y. 304)."

1944 * It is plain that the Order of Railway Conductors of America in attempting to present these particular claims to your Board is thereby merely trying to prevent this carrier from continuing its litigation in

Appeal from Charleston County

the South Carolina court. When a litigant has commenced an action in court it should not be denied the right to continue with that litigation. The language in the opinions above quoted clearly spell that out. 1946

Further convincing authority on this subject is *Washington Terminal Co. v. Boswell*, 124 Fed. (2), 235 (affirmed by an equally divided United States Supreme Court, 319 U. S., 732, Mr. Justice Rutledge not sitting). Therein it was stated that the issue was whether a carrier, which has been unsuccessful before the Adjustment Board, could maintain a suit for declaratory judgment of rights under a collective agreement during the two years which the Railway Labor Act allows for the employees' enforcement suit, and the United States Circuit Court of Appeals, through Mr. Justice Rutledge, answered in the negative. In other words the opinion stated in effect that a carrier could not on its own initiative institute proceedings in a court to review an award of the Adjustment Board, when the award is against the carrier. However, the following firm language is used in that opinion: 1946

"The foregoing considerations are reinforced by the fact that the carrier, under the decision in *Moore v. Illinois Central R. R.*, *supra*, can bring its suit on the contract, independently of the statute, prior to the time when the dispute is submitted to the Board. Until then, at least, it has its election to pursue the exclusively judicial remedy or to follow the administrative and judicial one provided by the Railway Labor Act. When it chooses the latter, we think it is bound to follow it through to the conclusion prescribed by the statute. Such a choice is made, we think, not only when the carrier submits or joins in submitting the dispute to 1947

Southern Rwy. Co. v. Order of Rwy. Con. of America

the Board, but, when under submission by an employee, it appears before the Board and participates in a full hearing on the merits. Having done these things, had the chance of a favorable decision, and finally, when it has lost, been confronted only with an order not enforceable except by a suit which has not been brought, which it seeks in effect to forestall by this one, and in which, if begun, it would have had a full day in court, plaintiff cannot complain that it has not had complete opportunity to protect its rights or that they have not been protected adequately."

1940 The above quoted language clearly states that a carrier has the alternative of submitting its case to the Adjustment Board or to a judicial tribunal. If a strictly judicial remedy is sought it should preclude the jurisdiction of the Adjustment Board.

There is no question but that the individual conductors would be bound by a judgment of the Court of Common Pleas for Charleston County, South Carolina.

1941 Section 7796 of the *Code of Laws of South Carolina*, 1942, under which this carrier's action was instituted against the Order of Railway Conductors of America provides:

"Unincorporated association—by what name may be sued.—All unincorporated associations may be sued and proceeded against under the name and style by which they are usually known, without naming the individual members of the Association."

Section 7797 of the *Code of Laws of South Carolina*, 1942, says:

1942 "On whom process may be served.—Process served on any agent of any unincorporated as-

Appeal from Charleston County

sociation doing business in this State, under the name and style by which it is usually known, shall be sufficient to make such association a party in any court of record in the county in which such agent may be served." 1962

Section 7798 of the *Code of Laws of South Carolina*, 1942, provides:

"Liability under final process.—On judgment being obtained against such association under such process, final process may issue to recover satisfaction of such judgment, and any property of the said association, and the individual property of any co-partner or member thereof, found in the State, shall be liable to judgment and execution for satisfaction of any such judgment." 1964

From the sections of the Georgia Code, above quoted, it is clear that a judgment in a suit against an unincorporated association binds the individual members, and that final process may be obtained against said individuals from such an action. This is pointed out in the following language of the Supreme Court of South Carolina in the opinion in *Ex Parte Baylor*, 93 S.C. 414, 77 S.E. 59, 60: 1962

"It seems clear that these sections (speaking of those quoted above) are intended to apply to just such associations as the one before the court, and to provide a method of bringing before the court associations of persons doing business under a common name, but having no corporate existence, by service of process upon their agent, and to provide for the issuance of final process against the individual members. There is no question that in the original cause the summons was duly served upon the president of the association, who, more 1964

Southern Rwy. Co. v. Order of Rwy. Con. of America

1967

than he, could be considered the agent of the association. But, as stated above, no effort is made to show that the president is not the agent of the association. It seems to me that the petitioners (who were not originally actually served with summonses, etc.) were before the court by the substituted service provided by the statute."

For the reasons hereinbefore mentioned this Board is bound to dismiss this case for want of jurisdiction.

1968

Oral hearing is hereby requested specially and solely on the issue of jurisdiction, reserving to respondent the right to answer on the merits, and to request oral hearing thereon, when and if the Board should decide that it has jurisdiction.

Respectfully submitted,

by - C. D. Mackay,

Assistant Vice President

For: Southern Railway Company

Washington, D. C.

1969

January 29, 1946.

CARRIER'S EXHIBIT "A"

This Exhibit is not reprinted, being the Complaint for Declaratory Judgment which has already been printed above.

Appeal from Charleston County

CARRIER'S EXHIBIT "B"

PETITION FOR REMOVAL TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

COMES NOW your petitioner, the defendant above named, and respectfully shows to this honorable Court:

1. That your petitioner is the defendant herein and at all times in said Complaint mentioned has been and still is a labor organization, international in scope, and certified by the National Mediation Board under the Railway Labor Act, U. S. C. A. Title 45, Section 151, *et. seq.*, as the duly elected and authorized representative of the class and craft of conductors on the lines of the Southern Railway Company, plaintiff herein.

2. That the above entitled action has been commenced by the Plaintiff above named against this Defendant in the Court of Common Pleas for Charleston County, in the State of South Carolina, on or about the 12th day of July, 1945, by the service of a Summons and Complaint.

3. That the said above entitled action is of a civil nature.

4. That this suit arises under the constitution and laws of the United States in that this case involves a federal question, that is, whether or not this plaintiff may disregard the provisions of the Railway Labor Act of 1934 and the procedure set forth therein for the handling, adjustment and determination of disputes between the carriers and their employees growing out of the interpretation or application of collective bar-

Southern Rwy. Co. v. Order of Rwy. Con. of America

1945
gaining agreements concerning rates of pay, rules or working conditions and seek a judicial determination of such disputes, thereby attempting to deny to this defendant as the certified representative of the class and craft of conductors on plaintiff's lines the right under the Railway Labor Act to submit and obtain a hearing and determination of said alleged disputes by the National Railroad Adjustment Board or to otherwise proceed under the provisions of said Act. Your Petitioner avers that the said disputes alleged by this plaintiff are being handled by your petitioner in the usual manner as provided by Section 3(i) of the Rail-
1946 way Labor Act as a condition precedent to the submission of said disputes to the National Railroad Adjustment Board and up to the filing of this suit were so handled by the plaintiff herein; that the result of this case will depend on the construction and interpretation of the terms and provisions of the Railway Labor Act as to whether this plaintiff is entitled under said Act to withdraw disputes being processed for submission to the said National Railroad Adjustment Board and submit said alleged disputes growing out of the
1947 interpretation and application of collective bargaining contracts for judicial determination; and that your petitioner denies the right of this plaintiff to withdraw said disputes from the scope of the remedies provided by the Railway Labor Act.

5. That the matter in dispute exclusive of interest and costs exceeds Three Thousand Dollars (\$3,000.00).

1948 6. That the time for pleading under the laws of the State of South Carolina or any rule of court has not elapsed and your Petitioner has not as yet appeared or pleaded in this action.

7. That your petitioner herewith offers and files herein a good and sufficient bond conditioned according to law and that your petitioner will enter in the District Court of the United States in and for the Eastern District of South Carolina, within thirty (30) days from the filing of this petition for removal, a certified copy of the record in said action, and for the payment of all costs that may be awarded by said District Court if said court shall hold that this action was wrongfully or improperly removed thereto, as provided by the Statutes of the United States.

WHEREFORE, your petitioner prays that this petition and said bond may be accepted by this court and that said suit may be removed into the District Court of the United States in and for the Eastern District of the State of South Carolina, pursuant to the statute in such case made and provided and that a transcript of the record herein be directed to be made up as provided by law, and that no further proceedings be had herein in this court.

BY

Mitchell & Horlbeck
Attorneys

F. H. Horlbeck
Of Counsel

STATE OF IOWA)
) ss.
COUNTY OF LINN)

I, G. H. Oram, being first duly sworn state that I am the duly elected, qualified and acting General Secretary-Treasurer of the Order of Railway Conductors of

Southern Rwy. Co. v. Order of Rwy. Con. of America

1973 America, the defendant named in the above entitled action, that I have read the foregoing petition, and that the statements and allegations therein contained are true as I verily believe.

G. H. Oram

General Secretary-Treasurer

Order of Railway Conductors of America

Subscribed and sworn to before me this 21st day of July, A. D. 1945.

S. M. Hoffner

Notary Public in and-for Linn
County, Iowa.

1974

CARRIER'S EXHIBIT "C"

This Exhibit is not reprinted, being the Answer of Defendant and Bulletin attached as Exhibit 2 which has already been printed above.

CARRIER'S EXHIBIT "D"

1975 This Exhibit is not reprinted, being the Answer of Defendant and Bulletin attached as Exhibit 2 in the same form as Exhibit "C" last above except that it was captioned and filed in the District Court of the United States for the Eastern District of South Carolina.

CARRIER'S EXHIBIT "E"

Motion to Remand

1976 Plaintiff moves to remand the above entitled cause to the Court of Common Pleas for Charleston County in the State of South Carolina on the ground that this Court is without jurisdiction to hear and determine the cause:

Appeal from Charleston County

1. In that no federal question is disclosed by plaintiff's complaint and defendant cannot by its petition answer or defenses inject any such questions for the purpose of removal. 1977

Frank G. Tompkins

J. M. Cohen

L. M. Abbot

Barnwell & Whaley

Nath B. Barnwell

32 Broad St. Charleston, S. C. 1978

Attorneys for Plaintiff

CARRIER'S EXHIBIT "F"

Notice

*To Messrs. V. C. Shuttleworth, Mitchell & Horlbeck
and F. H. Horlbeck, Attorneys for Defendant:*

Please take notice that the Plaintiff, at the Hearing of the Motion to Remand the above entitled cause to the Court of Common Pleas for the County of Charleston, South Carolina, which is set down to be heard on Tuesday, October 30, 1945, at eleven o'clock A. M., will rely on the following additional grounds for its motion to remand, and that, prior to the Hearing, the undersigned will move to amend the original Motion to Remand accordingly, to wit: 1979

2. In that the suit does not arise under the Constitution or under the laws of the United States.

3. In that the cause of action as set out in the Complaint involves no dispute or controversy respecting 1980

Southern Rwy. Co. v. Order of Rwy. Con. of America

the validity, construction or effect of the Constitution
or of any laws of the United States.

1981

Respectfully,

Frank G. Tompkins

J. M. Cohen

L. M. Abbot

Barnwell & Whaley

Nath B. Barnwell

32 Broad St. Charleston, S. C.

Attorneys for Plaintiff

1982

CARRIER'S EXHIBIT "G"

Opinion and Order

Civil No. 1367

The above entitled cause was instituted in the Court of Common Pleas for Charleston County, State of South Carolina, praying a declaratory judgment under the South Carolina Statutes (Code of Laws of S. C. (1942), Sec. 660). The plaintiff is a nonresident corporation. The defendant is an unincorporated association, its membership being made up of railway conductors in various parts of the United States, including a number of members in Charleston County. The suit was properly brought in the name of the unincorporated association in accordance with Sections 7796 and 7797 of the Code of Laws of South Carolina (1942). The controversy relates to the construction of a contract of employment between the plaintiff railway company and the railway conductors.

1983

1384

Appeal from Charleston County.

The defendant removed the cause from the State Court by appropriate proceedings, alleging in the petition for removal that the suit is one that arose under the Constitution and laws of the United States and involves a federal question arising under the provisions of the Railway Labor Act of 1934 (Title 45 U. S. C. A. Sec. 151 *et seq.*). Although it is alleged that the matter in dispute exceeds \$3,000.00 there is no diversity of citizenship alleged or shown. —

The plaintiff railway company has appeared and filed its motion to remand. The Railway Labor Act as adopted by Congress contains many provisions relating to relations between railroads and their employees. Among other things, there is established an adjustment board known as "National Railroad Adjustment Board", which board is divided into certain divisions. The "First Division" is "To have jurisdiction over disputes involving train and yard service employees of carriers" (Title 45 U. S. C. A. Section 153 (h)). Subdivision (i) of the same section is as follows:

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

Southern Rwy. Co. v. Order of Rwy. Con. of America

19.2 It will be noted that the first part of the above section provides that these disputes "*shall*" be handled by certain negotiations up to the point of reaching an adjustment. But the latter part of the section provides that where the parties fail to reach an adjustment the dispute "*may*" be referred by petition to the appropriate division of the Adjustment Board.

1990 From the foregoing language it appears that Congress intended that disputes of the character covered by the pending cause may be adjusted in either of two ways. First, under the authority of the act by carrying it before the Adjustment Board, or second, by exercising the common law rights of any parties to bring an action to construe a contract and protect his rights. And so it is quite clear that there is concurrent jurisdiction of the subject matter of this suit either by the Adjustment Board or a court of competent jurisdiction. The parties by agreement may use either method of adjudication, or either party may institute an action in a court or before the board. I am of the opinion that if the matter is taken first before a court it will retain jurisdiction and carry the case through to an adjudication. If, however, the board has taken jurisdiction the court will not interfere. These views seem amply sustained by numerous decisions of our courts. In *Moore v. Illinois Central Railroad Company*, 312 U. S. 630, 635, the court says:

1991 " * * * the legislative history of the Railway Labor Act shows a consistent purpose on the part of Congress to establish and maintain a system for peaceful adjustment and mediation *voluntary* in its nature. The District Court and the Circuit Court of Appeals properly decided that petitioner was *not required* by the Railway Labor

1992

Appeal from Charleston County—

Act to seek adjustment of his controversy with the railroad as a prerequisite to suit for wrongful discharge." (Emphasis added.) 1993

That case was first brought in the State Court for Hinds County, Mississippi. Upon certain questions of law the case went to the Supreme Court of Mississippi and was sent back for trial. Thereafter the plaintiff amended his pleadings by asking for damages in the sum of \$12,000.00 and the defendant being a nonresident corporation removed the case from the State Court to the Federal Court. The jurisdiction of the Federal Court, was, therefore, based entirely upon citizenship and the requisite jurisdictional amount. See 24 Fed. Supp. 731. 1994

In *Washington Terminal Company v. Boswell*, 124 Fed. (2d) 235, 249, the Circuit Court of Appeals for the District of Columbia, upon the authority of the *Moore case*, (*supra*) stated that a dispute between a railroad company and its employees may be taken directly into the court or under the Railway Labor Act before the Adjustment Board. The court says:

"The foregoing considerations are reinforced by the fact that the carrier, under the decision in *Moore v. Illinois Central R. R.*, *supra*, can bring its suit on the contract, *independently of the statute*, prior to the time when the dispute is submitted to the Board. Until then, at least, it has its election to pursue the exclusively judicial remedy or to follow the administrative and judicial one provided by the Railway Labor Act." (Emphasis added.) 1995

The opinion was written by Mr. Justice Rutledge, then a member of the Circuit Court of Appeals for 1996

Southern Rwy. Co. v. Order of Rwy. Con. of America

1997 the District of Columbia and now on the Supreme Court of the United States. The decision was affirmed by a divided court, four to four, Mr. Justice Rutledge taking no part in the decision.

See also *Delaware & Hudson Railway Corporation v. Williams*, 129 Fed. (2d) 11 (7th C. C. A.). There are numerous other cases, including cases in the State Courts, sustaining these views, but I think that the foregoing are sufficient to amply sustain the views announced as to the construction of the act in question. In the absence of any exclusive jurisdiction conferred by the Railway Labor Act there is no reason why a suit involving conductors' rights, such as are involved in this case, should not be brought in a State Court, subject of course at anytime, to removal to a Federal Court upon the ground of diversity of citizenship provided the essential elements are shown. They are not present in this cause and for that reason I feel constrained to grant the motion made by the plaintiff to remand the cause to the State Court. Accordingly, it is

1999 ORDERED, that the above entitled cause be and the same is hereby remanded to the Court of Common Pleas for Charleston County, in the State of South Carolina, for such action and proceedings as may be appropriate therein.

J. Waties Waring

United States District Judge

Charleston, S. C.

October 31, 1945.

Appeal from Charleston County

CARRIER'S EXHIBIT "H"

This Exhibit is not reprinted, being Defendant's ²⁰⁰¹ Notice of Grounds of Oral Demurrer, which has already been printed above.

H. W. Fraser, President
F. H. Nemitz, Senior Vice-Pres.
G. H. Oram, Gen. Secy. & Treas.

ORDER OF RAILWAY CONDUCTORS OF
AMERICA

Cedar Rapids, Iowa
Southern Railway.

2002

January 31, 1946

Mr. T. S. McFarland, Secretary,
First Division, N. R. A. B.
39 South LaSalle Street,
Chicago 3, Illinois

Dear Mr. McFarland:

I have today approved and enclose one copy of ex parte submission of dispute between our Committee and the Southern Railway System, as follows: ²⁰⁰³

"Claims of Charleston Division conductors as filed by each individual conductor for pay for 100 miles at local freight rate for each date shown after their names in addition to pay for service trip on local freight trains 60 and or 61 operated between Charleston, South Carolina and Branchville, South Carolina on straightaway basis for being required to make a side trip from Pregnal, South Carolina to Harleyville, South Carolina and return to Pregnall, a distance of $63\frac{1}{4}$ miles in each direction, or $131\frac{1}{2}$ miles for round trip movement: ²⁰⁰⁴

Southern Rwy. Co. v. Order of Rwy. Con. of America

Conductor M. D. Lloyd, September 7 and 9; October 21, 24, 26, 28, 30, and 31; November 2, 4, 14, 16, 28, and 30; December 2, 4, 7, 9, 12, 14, 1944; February 20, 22, and 27; March 15 and 17, 1945.

Conductor T. M. Dukes, December 21, 23, 26, 28, and 30, 1944; July 2, 1945.

Conductor R. E. Bolchoz, January 27, 1945.

Conductor I. D. Pooser, March 8, 1945.

Conductor M. S. DeWitt, June 7, 21, 23, 26, 28; July 12, 14, 1945.

And all subsequent trips; also claim for all other conductors who performed like service on subsequent dates.

Please docket this submission for hearing and decision at your Board.

Oral hearing is waived unless requested by the Carrier.

General Chairman J. A. Raynes, has forwarded the required number of copies of this submission direct to your Board.

Very truly yours,

H. W. Fraser (Signed)
President

M

CC: Mr. J. A. Raynes,

Chairman, O. R. C.

Southern Railway Gen. Comm.

Appeal from Charleston County

February 7, 1946

Mr. C. D. Mackay, Ass't. Vice President
Southern Railway Company
Washington 13, D. C.

Mr. H. W. Fraser, President
Order of Railway Conductors of America
Order of Railway Conductors Building
Cleveland, Ohio

Gentlemen:

Our docket number has been assigned as indicated to the following Southern Railway Co., and the Order of Railway Conductors case which was submitted ex parte at the instance of the General Chairman representing the organization on that railroad and which has been completed.

21558—Claims of Charleston Division Conductors as filed by each individual conductor for pay for 100 miles, etc:

Conductor M. D. Lloyd, September 7,
etc.,

Conductor T. M. Dukes, September 21,
and etc.,

Conductor R. E. Bolchoz, January 27,
1945,

Conductor I. D. Pooser, March 8, 1945,

Conductor M. S. DeWitt June 7 and all
other dates on the claim.

At the direction of the Division I am sending to the Management copies of the Employees' submission and

Southern Rwy. Co. v. Order of Rwy. Con. of America
to the General Chairman copies of the Management's
submission.

Very truly yours,

T. S. McFarland,

Executive Secretary.

TSM/mol

cc: Mr. J. A. Raynes, Chairman

ORDER OF RAILWAY CONDUCTORS
OF AMERICA

April 9, 1946

2014 Mr. T. S. McFarland, Secretary

National Railroad Adjustment Board, First Div.

39 S. LaSalle Street

Chicago, Illinois

Dear Sir:

This is to request that you furnish us with certified
copies of the following documents in Docket 21558.

Letter of J. T. Lawrence to T. S. McFarland, dated
November 19, 1945.

2016 Letter of J. T. Lawrence to T. S. McFarland, dated
November 30, 1945.

Letter of C. D. Mackay to T. S. McFarland, dated
November 26, 1945.

Letter of T. S. McFarland to J. T. Lawrence, dated
November 28, 1945.

Letter of J. A. Raynes to T. S. McFarland, dated
January 24, 1946.

Letter of C. D. Mackay to T. S. McFarland, dated
January 30, 1946.

2018 Letter of H. W. Fraser to T. S. McFarland, dated
January 31, 1946.

SUPREME COURT

505

Appeal from Charleston County

Letter of T. S. McFarland to C. D. Mackay and H. W. Fraser, dated February 7, 1946.

2017

Employees' submission.

Carrier's submission.

Yours very truly,

Signed

H. W. Fraser

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

April 9, 1946

2018

Mr. H. W. Fraser, President
Order of Railway Conductors
Cedar Rapids, Iowa

Dear Sir:-

In compliance with your request of 9th instant, there are attached hereto copies of the records in Docket No. 21558 of the First Division of the National Railroad Adjustment Board as specified in your letter.

Yours very truly,

2019

T. S. McFarland,
Executive Secretary.

TSM:dls

Attachments

Southern Rwy. Co. v. Order of Rwy. Con. of America

ORDER OF RAILWAY CONDUCTORS
OF AMERICA

3021

April 27, 1946

Mr. T. S. McFarland, Secretary,
First Division, N. R. A. B.
39 South La Salle Street,
Chicago 3, Ill.

Dear Sir:

3022

In connection with your Board Docket No. 21558, I am attaching for your information and office record, and for the information of your Board, Certified copy of Order by Judge Steve C. Griffith, Court of Common Pleas, sustaining Demurrer.

Very truly yours,

Signed

H. W. Fraser

DM

Encl

CC: Mr. F. J. Williams

3023

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

June 4, 1946

Mr. H. W. Fraser, President
Order of Railway Conductors of America
Order of Railway Conductors Building
Cedar Rapids, Iowa

Dear Sir:-

3024

We did not acknowledge your letter of April 27, 1946 and the enclosed-Certified Copy of Order of Judge Steve C. Griffith, Court of Common Pleas.

SUPREME COURT

507

Appeal from Charleston County

We now thank you for having furnished this as information in connection with Docket No. 21558.

Yours very truly,

T. S. McFarland,
Executive Secretary.

TSM:dlb

SOUTHERN RAILWAY SYSTEM

February 21, 1947 •

C-307

Mr. T. S. McFarland, Secretary,
First Division, National Railroad Adjustment
Board,
39 South LaSalle Street,
Chicago, Illinois.

Dear Sir:

Referring to my telegram of November 23, 1945, letter of November 26, 1945, and letter of January 30, 1946, in connection with ex parte submission by Mr. J. T. Lawrence, General Chairman of the Order of Railway Conductors of America, with respect to claims of Charleston Division Conductors as filed by each individual conductor for 100 miles at local freight rate for each date, as shown opposite their names, in addition to service trip on local freight train 60 and/or 61, operated between Charleston, South Carolina, and Branchville, South Carolina, on straightway basis for turnaround trip from Pregnall, South Carolina, to Harleyville, South Carolina, and return to Pregnall, a distance of 6 and 3/4 miles in each direction:

For the information of the Board and to complete your file, I am enclosing to you herewith copy

Southern Rwy. Co. v. Order of Rwy. Con. of America

of decision of the Supreme Court of South Carolina with respect to the suit which we filed in this case. You will observe from the decision that the Supreme Court reversed the decision of the Circuit Court of Charleston County, Steve C. Griffith, Judge, which dismissed the declaratory judgment suit which we had brought, and from which decision we appealed.

Under this decision, the case will have to be tried upon its merits by the Charleston County Circuit Court. Inasmuch as the claim in question was filed before your Board by Mr. Lawrence and is now finally in the hands of the court for decision, we renew our suggestion that the First Division is without jurisdiction and that the claim which had been filed should be dismissed. We ask that appropriate action be taken to this end.

Very truly yours,

Signed

C. D. Mackay

Assistant Vice President.

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

February 26, 1947

Mr. C. D. Mackay, Assistant Vice President
Southern Railway System
Operating Department
Washington 13, D. C.

Dear Sir:

Receipt is respectfully acknowledged of your letter of 21st instant, File C-307, enclosing copy of Opinion

SUPREME COURT

509

Appeal from Charleston County

No. 15913 in Case No. 2762 of the Supreme Court of the State of South Carolina.

Your letter refers to claim covered by our Docket No. 21558, and we thank you for having furnished this information.

Yours very truly,

T. S. McFarland,
Executive Secretary.

TSM/JS

DEFENDANT'S EXHIBIT "F"

For Identification (Offered in evidence by defendant
and excluded by Trial Judge)

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

39 South LaSalle Street, Chicago 3, Illinois
Telephone: Andover 1050

STATE OF ILLINOIS)

: SS

COUNTY OF COOK)

I, T. S. McFARLAND, being first duly sworn state that I am the Executive Secretary of the NATIONAL RAILROAD ADJUSTMENT BOARD, FIRST DIVISION, and as such I am the custodian of and in charge of all of the records of the First Division of said Board; and I do hereby certify that the following statement, taken from those records, is true and correct:

For the period from December 9, 1935 to and including June 12, 1947, a total of three hundred and eighty-three (383) cases have been filed with the First Division of the National Railroad Adjustment Board on behalf of employees of the Southern Railway or its

Southern Rwy. Co. v. Order of Rwy. Con. of America

subsidiary railway companies. Three hundred and seventy-nine (379) of these cases have been disposed of either by award or by withdrawal. Four cases were pending for decision and award as of June 12, 1947. Included in the pending cases is Docket No. 21558 filed by the Order of Railway Conductors on February 7, 1945.

The following tabulation reflects the number of cases filed, awards entered, cases withdrawn and cases pending against the Southern Railway Company and its subsidiaries for the period of December 9, 1935 to and including June 12, 1947, being all the cases involving the Southern Railway Company or its subsidiaries before the First Division of the National Railroad Adjustment Board.

	Cases Filed	Withdrawn	Awards Entered	Pending
SOUTHERN RAILWAY COMPANY	214	40	171	3
New Orleans and Northeastern	1	1	None	None
Cincinnati, New Orleans and Texas				
Pacific	136	80	56	None
Alabama, Great Southern	14	3	11	None
Georgia, Southern and Florida	18	10	7	1
TOTAL	383	134	245	4

Of the above, Conductors participated in

89	24	63	2
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IN WITNESS WHEREOF, I have signed and sealed this 17th day of June, 1947.

T. S. McFarland
Executive Secretary

Subscribed and sworn to before me this 17th day of June, 1947.

W. C. Frohning
Notary Public in and for Cook County
State of Illinois

(Notarial Seal)

My Commission expires July 10, 1947.

Appeal from Charleston County

MOTION TO DISMISS

NOW COMES the Defendant above named and, at the close of all the evidence in this cause, moves the Court to dismiss this action for the following reasons, to wit:

1. The Congress of the United States by enactment of the Railway Labor Act, 45 U. S. C., Section 151 *et seq.*, has foreclosed resort to the Courts for the adjudication and determination of controversies of the character alleged and shown herein.

2. Plaintiff is not entitled by this action to interfere with and deny to defendant and the individual conductors represented by defendant the rights and processes of the collective bargaining and the further procedures and remedies provided in said Railway Labor Act for the adjustment and settlement and determination of disputes and controversies of the character shown herein.

3. The action as shown by the pleadings and evidence herein does not present a controversy appropriate for declaratory relief.

4. That on both jurisdictional and discretionary grounds the action does not present a justiciable controversy because of the Railway Labor Act and the decisions thereunder.

5. Plaintiff is not entitled to Judicial relief in the absence of any evidence showing compliance with the terms and provisions of the Railway Labor Act and has wholly failed to exhaust the administrative remedies for the adjustment, settlement and determination of disputes of the character shown herein.

ELLIOTT, SHUTTLEWORTH & INGERSOLL,
MITCHELL & HORLBECK,

Attorneys for Defendant.

FINAL DECREE

2045 This action was instituted against the defendant by Southern Railway Company in July, 1945, under the declaratory judgment Act of this state, Code, Section 660, for the purpose of obtaining a construction of a written contract between the plaintiff and the defendant, Order of Railway Conductors of America. The question presented by the complaint is whether certain industrial switching movements to the plant of the Ancor Corporation at Pregnall, South Carolina, an intermediate point on plaintiff's railroad line between Charleston and Branchville, are part of the service
2046 trips of conductors in charge of local freight trains between Charleston and Branchville; or whether such conductors are entitled to an additional day's pay for performing switching operations to the plant of the Ancor Corporation, separate and apart from and in addition to the pay for their service between Charleston and Branchville.

When this case first came on for hearing in this court, a demurrer to the complaint was sustained on the grounds that the court did not have jurisdiction,
2047 and the court in the exercise of its discretion refused to take jurisdiction. The plaintiff appealed this ruling to the Supreme Court of South Carolina which reversed the judgment, holding that "the complaint alleged a cause of action for declaratory relief" and saying:

"In this case, after a hearing upon the merits, the court will exercise its discretion as to whether or not it will make a binding declaration." (41 S. E. (2d), 774, 779.)

2048 Following that decision the case came on for trial on the merits in this court. Upon the proof adduced

Appeal from Charleston County

at that trial I find that the following facts have been established:

The defendant is an unincorporated association engaged in union activities in Charleston County and is the duly authorized representative of and bargaining agent for the conductors employed by the plaintiff in the operation of the local freight trains on the line of railroad between Charleston and Branchville in all matters involved in and arising under a written contract dated May 16, 1940, between the plaintiff and the defendant entitled "Schedule of Wages and Rules and Regulations for Conductors". There exists an actual and continuing controversy as to the proper construction of this contract, with reference to service performed at Pregnall, South Carolina, by conductors on local freight trains on said line of railroad.

The distance from Charleston to Branchville is 63 miles; the average time consumed on the "straight-away" run of these local freight trains is approximately 6½ hours; the average time on duty of the conductors each day is approximately 8½ hours, the conductors going on duty at Charleston or Branchville as the case may be and being released from duty at the end of the run at the opposite terminal.

As a part of the regular service trips, the conductors in charge of the freight trains on the run perform such switching as is necessary over the industrial tracks of the various industries served by plaintiff along this line of railroad, and have been doing so continuously for many years, without demanding or being paid extra compensation. Conductors in charge of local freight trains have been instructed to perform such industry switching at Pregnall, South Carolina as may be necessary at the plant of the Ancor Corporation

Southern Rwy. Co. v. Order of Rwy. Con. of America

2063 over the privately owned industry tracks ever since their construction in 1943. These tracks connect with the plaintiff's railroad within the yard limits at Pregnall and extend some 6 miles to the plant of the Corporation. This industry switching consists of the local freight trains taking cars the destination of which is the plant of the Ancor Corporation, to the plant, placing the cars on the designated track or tracks, and then picking up and hauling from the plant to the plaintiff's main line any cars destined to other points.

2064 The testimony further establishes that those movements are similar to those performed on innumerable other industry tracks which join plaintiff's railroad line and have always been accepted and agreed to in practice by the conductors of plaintiff's local freight trains as a part of their service trips and have been performed pursuant to the terms of the said contract.

2065 The basic rate of pay for these conductors in effect at the time of the commencement of the suit (the distance run being less than one hundred miles) was \$9.10 per day for eight hours service or less, and if service exceeded eight hours they were entitled to additional pay for overtime on a minute basis at the rate of \$1.71 an hour. The basic day rate has now been increased to \$10.58, and the overtime rate to \$1.98½ an hour.

2066 The defendant as the duly authorized representative and bargaining agent of the conductors of plaintiff demanded that plaintiff pay additional compensation to the conductors under the contract here involved at the rate of a minimum day's pay, or \$9.10 per day, separate and apart from and in addition to their regular pay of \$9.10 plus overtime for the local freight service each time industry switching service is performed at Pregnall.

Appeal from Charleston County

The defendant handled these claims beginning shortly after the filing of the first claim on September 9, 1944, claiming that the performance of the industry switching at the plant of the Ancor Corporation entitled the conductors to an additional day's pay, separate and apart from, and in addition to their pay for the local freight service trip between Charleston and Branchville, which claims the plaintiff contends are a violation of the articles of the contract referred to above. The claims were appealed by defendant to the highest officer of the plaintiff authorized to handle such claims and were formally rejected.

The defendant has continued to assert such claims which the conductors have been filing continuously down to the present date so that as a result of the continuing accrual of these claims the plaintiff is faced with a growing potential liability in the event the defendant's claims are justified. For the period September 7, 1944 to July 14, 1945 alone there were filed some 40 claims for an additional day's pay by conductors. The testimony also shows that if this service were performed on each working day by conductors during a year's period the liability would amount to \$2,848.00 at the rate of pay then effective, or \$3,311.00 at the current rate of pay. It further appears that if the conductors should ultimately prevail, the plaintiff would also be liable for large sums to other members of those local freight train crews whose contracts have provisions similar to those of the conductors' agreement here involved. It is thus clear that unless this controversy is settled the plaintiff will be subjected to substantial injury and damage.

Articles 5, 6 and 7 of the contract here under consideration establish the basis of the compensation to

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be paid to conductors in this local freight service and are as follows:

“ARTICLE 5

“BASIC DAY

“(a) In all road service, except passenger, 100 miles or less, 8 hours or less (straightaway or turn-around), shall constitute a day's work; miles in excess of 100 will be paid for at the mileage rates provided, except as provided for in Article 28.

“(b) In through freight or mixed train service, a straightaway run is a run from one terminal to another terminal; and not less than one hundred miles will be allowed for each such run, except as provided for in Article 28.

“ARTICLE 6

“BEGINNING AND ENDING OF DAY

“In all classes of service, other than passenger, conductors' time will commence at the time they are required to report for duty and shall continue until the time they are relieved from duty at end of run.

“ARTICLE 7

“OVERTIME

“In all service, except passenger, runs of 100 miles or less, overtime will begin at the expiration of 8 hours; on runs of over 100 miles overtime will begin when the time on duty exceeds the miles run divided by 12½. Overtime shall be paid for on the minute basis, at a rate per hour of three-sixteenths of the daily rate, as shown in Article 4, Sections (a), (b) and (c).”

Appeal from Charleston County

Article 5 (a) merely provides that a conductor going on duty and performing service must be paid for a minimum day's pay of "100 miles or less, 8 hours or less".

Article 6 provides that his day begins from the time he goes on duty at the initial terminal and continues until he goes off duty at the final terminal. In other words, he is to be paid for all time on duty on a continuous time basis. There is no provision for interrupting the time under any circumstances.

Article 7 awards the conductors pay at time and one-half rates for all time on duty in excess of 8 hours on runs of less than 100 miles which is the case on the Charleston-Branchville run. This article, as shown by the testimony, was placed in the contracts by the Director General of Railroads in 1919 as a means of adjusting the pay of men in local freight service, and providing time and one-half rates for hours of service performed in excess of 8 hours. The article was granted by him on the specific condition that any and all arbitraries and special allowances (extra pay) including those for any work performed en route by a crew, would be abolished. According to the testimony, the only way these extra "arbitraries" or payments for work en route were authorized thereafter was by the negotiation and execution of special agreements.

There is no provision in the contract for extra compensation in the case of industrial switching.

In Article 28 of the contract we find a general rule providing for "Exceptions". These exceptions provide for special arrangements for the basis of compensating crews on "circus trains", "good roads, agricultural cars, etc.", and certain specified "excepted runs", that would otherwise be governed by general

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provisions of the contract including Articles 5, 6 and 7. There is no testimony and it is not claimed that any of these named exceptions in Article 28 provide for extra compensation over and above the regular day's pay for local freight conductors required to perform industrial switching on the track serving the Ancor Corporation at Pregnall, S. C.

Another provision of the contract which appears to be involved is in the next to last paragraph of the contract (page 67) under the heading "Terms of Agreement", as follows:

"This agreement supersedes and cancels all former agreements, but does not, except where rules are changed, alter former accepted and agreed to practices, working conditions or interpretations."

There has been no showing whatsoever by the defendant of any "former accepted and agreed to practices, working conditions or interpretations" to support their claim that Article 5 (a) of the contract provides for additional compensation over and above that for the service trip when a crew performs industrial switching or service on a track such as that at Pregnall, S. C. On the other hand, the evidence is clear that industrial switching has been performed over a long period of time by local freight crews as part of their regular work, and has never been the basis for extra compensation except in a few cases where the parties have negotiated a special agreement providing for such payment.

The contract further provides the proper procedure for making a change or amendment to its terms as follows:

Appeal from Charleston County

"This agreement is effective as of May 16, 1940, and cancels all other rules in conflict herewith and is to remain in effect until revised or abrogated by thirty (30) days written notice from either party to the other, and in accordance with provisions of the amended Railway Labor Act."

2073

For the service trips made by the local freight trains in question, it has been established that the conductors were paid for all time on duty continuously from the time they went on duty at their initial terminal until the time they went off duty at their final terminal, including the time spent at Pregnall and on the tracks serving the Ancor Corporation. The conductors were paid for each such service trip at least a minimum day's pay (\$9.10) for 100 miles or 8 hours and in addition thereto time and one-half pay for any time spent on duty over and above 8 hours.

2074

Defendant contends that the service performed on the private track at Pregnall for the Ancor Corporation was outside the assignment of the conductors on the local freight trains in question and constituted "side trips" or "lap back trips" for which they were entitled to an extra and additional day's pay under the provisions of Article 5 (a) of the contract quoted above.

2075

It has been clearly established that the conductors on the runs in question were on local freight service assignments running between Charleston and Branchville, the terminals of the run, with Pregnall as an intermediate non-agency station. Even the defendant's witnesses corroborated plaintiff's evidence that part of the assignment of a local freight train is the switching of industrial tracks en route between the terminals.

2076

Southern Rwy. Co. v. Order of Rwy. Con. of America

2077 The evidence clearly showed that the track serving the Ancor Corporation has all the characteristics of an industrial track. It is used only for the purpose of serving a private industry (or industries, the plant of the Volunteer Cement Company being served thereon since the suit was filed); it is not open for the use of the public; it has no stations on it; no telegraph service; no regular trains; no mail or express service; and none of the other attributes of main or branch line tracks of a railroad company. It was also shown that there is nothing exceptional about the length of the track, in that there are other acknowledged industrial tracks on the carrier's railroad of comparable length. 2078 Likewise it was proven that the movements on the industrial track were substantially the same as switching service performed on other industrial tracks recognized as a regular part of a local freight run's assignment.

2079 Defendant's witnesses testified to three types of cases to show that the service on the track at Pregnall was a "side trip", "lap back trip", or turnaround" for which an additional day's pay accrued because the crew was taken outside its assignment.

As to the cases involving a "lap back trip", no such item appears in the contract and the testimony showed clearly that it had never been recognized by plaintiff that such a movement entitled a conductor to extra pay until an agreement known as the "lap back agreement of July 30, 1945" was negotiated and executed in 1945. The definition of that term agreed to in 1945 did not cover such service as was performed on the tracks at Pregnall, South Carolina.

2080 Another class of examples relied on by defendant were situations where the conductors had been re-

Appeal from Charleston County

quired to perform service beyond and after reaching the terminal of their assignment. Typical of such examples was a hypothetical one where the crew on the Charleston-Branchville local freight run was required to go several miles beyond the terminal at Branchville to perform some service. Such cases would apparently constitute a violation of Article 5 because by its very terms a straightaway run is a run from one terminal to another and the crew would have completed its run on reaching the terminal at Branchville. The evidence, however, establishes the fact that Pregnall is not a terminal and the service on the industrial track of the Ancor Corporation could not be beyond a terminal.

The third class of cases testified to by defendant's witnesses were those of situations where special agreements had been negotiated. Typical of these was an agreement to make an extra payment to crews serving the yard tracks at Blair, Tennessee, which serve the government atomic bomb plant. Such special agreements cannot, however, affect the questions under consideration here. The parties are, of course, free to negotiate special agreements to provide special payments to cover specific cases, but by doing so the general provisions of the basic contract are in no way changed in their application to other cases.

Defendant thus has not shown that the industry switching over the industrial track at Pregnall was any different from that of industrial switching that has always been considered a part of a local freight crew's assignment, to be paid for as part of the regular service trip.

Based on the facts reviewed above, it is clear that the plaintiff has made out a case for declaratory re-

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lief. The proof supports all the allegations of the complaint, concerning which the Supreme Court said in its opinion on the earlier appeal in this case that "the complaint alleged a cause of action for declaratory relief". *Southern Ry. Co. v. Order of Railway Conductors of America*, 41 S. E. (2d), 774.

In its answer the defendant alleges that this court does not have jurisdiction or at least should not take jurisdiction of this case because there is available the remedy provided by the Railway Labor Act, 45 U. S. C., Sec. 151 *et seq.*

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The effect of the Railway Labor Act and of the remedy afforded thereunder before the National Railroad Adjustment Board on this matter of jurisdiction has already been decided by the Supreme Court which said in part after reviewing the pertinent decisions:

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"In view of these decisions, it is our opinion that the Congress intended that controversies of the character set forth in this case may be adjusted in either of two ways: First under authority of the Act by submitting the dispute to the National Railroad Adjustment Board; or second, by exercising the common law rights of any party to bring an action to construe a contract and have his rights declared. There is a concurrent jurisdiction of the subject-matter of a suit of this kind, either by a court of competent jurisdiction or by the National Railroad Adjustment Board." (41 S. E. (2d), 774, 778.)

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And then, after quoting the South Carolina declaratory judgment Act (1942 Code, Sec. 660), the Supreme Court said:

"As a sanction for the maintenance of this action and for the relief demanded, the appellant

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comes squarely within the provisions of this section of the Code." (779.)

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It is therefore the law of this case that this court has jurisdiction notwithstanding the remedy provided by the Railway Labor Act. It may be noted in passing that the same conclusion was reached by the Federal Court, when this case was remanded to the State Court (*Southern Railway Co. v. Order of Railway Conductors*, 63 F. Supp., 306). This leaves only the question of whether the court will in the exercise of its discretion make a binding declaration, which the Supreme Court specifically left open for decision by the Trial Court after a hearing on the merits.

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As has already been pointed out by the Supreme Court, all the necessary parties are before the court, the situation giving rise to the controversy is local to South Carolina, and all necessary witnesses were available to the parties at the trial. Moreover, under the facts of this case, no other remedy exists under the laws of this State except that which is now claimed by the plaintiff. This leaves only for consideration the existence of the remedy before the National Railroad Adjustment Board as it might effect the exercise of this court's discretion. As to this the Supreme Court has provided a guide. It said:

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"That another remedy may exist, and that other relief may be available to the plaintiff, are factors to be considered by the court. However, before declaratory relief may be denied, in the discretion of the court, on the ground of the existence of other remedies, it must clearly appear that the asserted cumulative remedies are not only available to the plaintiff, but that they are speedy and adequate, or as well suited to the plaintiff's

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needs as declaratory relief." (41 S. E. (2d), 774, 779.)

Statistics from the annual reports of the National Railroad Adjustment Board to Congress for the years 1944, 1945 and 1946 introduced by plaintiff show that that Board has a very large backlog of cases and that it would take several years to secure a decision or award, which would still be subject to a court review entailing a trial *de novo*. It thus appears that that administrative remedy is not speedy and adequate. On the other hand, this court is in a position now to make a binding and final declaration that will settle the controversy between plaintiff and defendant.

The character and inadequacy of the procedure of the National Railroad Adjustment Board are likewise shown in the following excerpt from the opinion of the Third Circuit Court of Appeals in the case of *Dahlberg v. Pittsburg and L. E. R. Co. et al.*, 138 Fed. (2d), 121:

"The appellants now argue (although the point was not raised before the District Court) that under the Railway Labor Act of 1934, 45 U. S. C. A. 151 *et seq.*, the Court was without jurisdiction to review the award on its merits, its function being merely to decide the single question whether the award was within the statutory or constitutional authority of the Board. Their contention is based exclusively upon a provision of Sec. 3(m) of the Act, that the awards of the Board 'shall be final and binding upon both parties to the dispute.'

"In construing a statute, words may not be taken out of their context and endowed with an absolute quality nor may the plan of the entire statute be disregarded in interpreting any single

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provision. Obviously the expression 'final and binding' has its limitations. Even the appellants concede that the award is neither so final that it may not be set aside by the Court if the Board acted beyond its statutory authority nor so binding that the carrier can be compelled to obey it without the aid of the Court in enforcement proceedings. We think that the general plan of the statute clearly discloses an intention to use the words in the sense that the award is the definitive act of a mediative agency, binding until and unless it is set aside in the manner prescribed, and that it was intended that the Court should exercise broader powers than merely directing coercive process to issue if satisfied that the proceeding was authorized by law."

Then it was said:

"If it could be assumed that the Adjustment Board was a governmental agency still other doubts as to the Act's constitutionality would be present, for example, the question whether there is such a lack of safeguards in the procedure before the Board as to amount to a denial of due process, there being no Court review of the merits. This point was dealt with by Justice Rutledge in the *Washington Terminal Co. v. Boswell, supra* (124 F. (2d), 235), as follows: 'Much of the argument has been built around the alleged inadequacy of the administrative proceeding as complying with the requirements of due process, particularly in the absence of formal pleadings, opportunity for examining witnesses and cross examining them, opportunity for representation by counsel and for oral argument. These things would be im-

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2101

portant, if the Board's decisions were final in the legal sense and for purposes of enforcement, as to either facts or law. But, as has been shown, they have no such quality.' "

In conclusion:

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"The *Washington Terminal* case, *supra*, did not, it is true, directly involve this question, the point decided by it being that the employer might not, prior to enforcement proceedings by the employees, review an adverse award by means of an action for a declaratory judgment. However, the majority opinion said, *and reiterated, that the enforcement proceeding was a suit de novo* in which the employer was not limited in its defenses to matters stated in the award and that the findings of the Board did not have finality as to either facts or law. It is evident that a vast deal of careful study and elaborate attention was devoted to the writing of the opinion. Its dicta are persuasive and leave no doubt that it was indeed the considered opinion of the majority that awards are not final and binding to the extent which the appellants here contend." (Emphasis added.)

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An analagous case to that now under consideration is *Delaware, Lackawanna and Western R. Co. v. Slocum*, 183 Misc., 454, 50 N. Y. S. (2d), 313, 57 N. Y. S. (2d), 65, and 56 Fed. Supp., 634, which was mentioned by the South Carolina Supreme Court in its earlier opinion in this case. In the *Slocum* case the New York Court exercised its discretion in favor of granting declaratory relief in a controversy between a railroad and its employees over the interpretation of a collective bargaining contract.

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It is not considered necessary to review here the federal decisions on the effect of the remedy provided by the Railway Labor Act inasmuch as the Supreme Court has already considered them fully in its opinion which established the law of this case. 2106

The court is of the opinion that the remedy provided by the Railway Labor Act is not such as would require it to deny a declaration of the rights of the parties in this case, in the exercise of its discretion, and that the plaintiff is entitled to the relief prayed for in its complaint. Of course, if the defendant is not satisfied with the present provisions of the agreement, it is free to initiate amendments or changes by following the procedure provided in the last paragraph of the contract, and undertake to secure the desired relief by the normal processes of collective bargaining. 2108

It Is Therefore Ordered, Adjudged and Decreed that:

1. Under the terms of the contract of May 16, 1940, between the plaintiff and defendant:

(a) The movements on the private track serving the plant of the Aneur Corporation at Pregnall, South Carolina, are industrial switching and constitute a part of the service trips of the conductors of the local trains between Charleston and Branchville. 2107

(b) Plaintiff is obligated to pay conductors for the service trips of local freight trains between Charleston and Branchville, including the work on the track serving the Aneur Corporation at Pregnall, South Carolina, the applicable and governing compensation specified in the provisions of Articles 4, 5, 6 and 7. 2108

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2109 (c) Conductors are not entitled to an additional day's pay or any other additional compensation separate and apart from the pay for their service trip from Charleston to Branchville for performing switching on the track at Pregnall, South Carolina.

2110 2. Plaintiff has fully paid the local freight conductors for their services while operating the local freight trains which performed services at Pregnall, South Carolina, that resulted in the controversy between plaintiff and defendant over the construction of the contract of May 16, 1940.

3. Plaintiff is under no legal liability to satisfy the ~~claims or any similar claims which have been made~~ or may be made by defendant for extra compensation for conductors of local freight trains for performing industrial switching on the tracks serving the Ancor Corporation at Preghall, South Carolina.

At Chambers,
Charleston, S. C.
August 30, 1947.

WM. H. GRIMBALL,
Judge Ninth Judicial Circuit.

2111

NOTICE OF APPEAL

Within due time, to wit, on the 6th day of September, 1947, Defendant served upon Attorneys for Plaintiff notice in due form of intention to appeal from the above decree to the Supreme Court of South Carolina.

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EXCEPTIONS

A. *As to Jurisdictional, Discretionary and other Powers of State Court.* 2113

I

That his Honor erred in the exercise of his discretion in refusing defendant's motion and proposed order to amend its answer by amending Article 17 and adding Article 21 so as to set forth that the claims in controversy are now and have been pending before the National Railroad Adjustment Board and were otherwise processed pursuant to the terms of the Railway Labor Act of Congress as set forth in said proposed order; whereas the effect of his Honor's ruling was to preclude defendant from showing a vital point bearing upon the propriety of the exercise of his discretion in granting the declaratory judgment sought by Plaintiff in disregard of the Railway Labor Act of Congress and the ruling of the U. S. Supreme Court in the *Pitney* case. (*Order of Railway Conductors of America v. Pitney*, 326 U. S., 561, 66 S. Ct., 322.) 2114

II

That in view of the reservation of objections, jurisdictional or otherwise, filed by defendant at the very commencement of the trial, his Honor erred in granting the declaratory judgment sought by Plaintiff in advance of a construction of the contract by the National Railroad Adjustment Board. 2115

III

The Supreme Court of South Carolina in its former decision in this case having upon rehearing limited its holding as follows: 2116

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2117

"In this case, after a hearing upon the merits, the Court will exercise its discretion as to whether or not it will make a binding declaration.

"We are merely holding here that the complaint alleged a cause of action for declaratory relief; and for the reasons stated the circuit court of Charleston County has jurisdiction to entertain the action, and the lower Court erred in sustaining the demurrer";

2118

it is respectfully submitted that his Honor erred in exercising his discretion to grant the declaratory judgment sought by plaintiff after a hearing upon the merits in that in the exercise of a sound judicial discretion his Honor was obligated and required to stay his hand until opportunity had first been afforded for the National Railroad Adjustment Board to pass upon the construction of the contract.

IV

2119

That his Honor erred in refusing defendant's motion to dismiss the action, made at the close of all the evidence in the case; whereas he should have held that the Congress of the United States by enactment of the Railway Labor Act, 45 U. S. C. A., Section 151 *et seq.*, has foreclosed resort to ~~the~~ Courts for the adjudication and determination of controversies of the character alleged and shown herein.

V

2120

That his Honor erred in refusing defendant's motion to dismiss the action, made at the close of all the evidence in the case; whereas he should have held that Plaintiff is not entitled by this action to interfere with

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and deny to defendant and the individual conductors represented by defendant the rights and processes of the collecting bargaining and the further procedures and remedies provided in said Railway Labor Act for the adjustment and settlement and determination of disputes and controversies of the character shown herein. 2121

VI

That his Honor erred in refusing defendant's motion to dismiss the action, made at the close of all the evidence in the case; whereas he should have held that the Action as shown by the pleadings and evidence herein does not present a controversy appropriate for declaratory relief. 2122

VII

That his Honor erred in refusing defendant's motion to dismiss the action, made at the close of all the evidence in the case; whereas he should have held that on both jurisdictional and discretionary grounds the action does not present a justiciable controversy because of the Railway Labor Act and the decisions thereunder. 2123

VIII

That his Honor erred in refusing defendant's motion to dismiss the action, made at the close of all the evidence in the case; whereas he should have held the Plaintiff is not entitled to Judicial relief in the absence of any evidence showing compliance by Plaintiff with the terms and provisions of the Railway Labor Act and has wholly failed to exhaust the administrative remedies provided in said Act for the adjustment, settlement and determination of disputes of the character shown herein. 2124

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IX

2125 That his Honor erred in holding jurisdiction under the Declaratory Judgments Act of South Carolina (1942 S. C. Code, Section 660) to hear and determine a dispute between an interstate carrier by rail and the duly certified collective bargaining representative of its employees as to the interpretation and application of the agreement between the parties relating to rates of pay, rules and working conditions; whereas his Honor should have held that the construction and interpretation involved a technical trade agreement and technical terms therein requiring the proper application of extrinsic evidence of established customs and practices in the industry and the necessity for resort to expert testimony as to the meaning and interpretation of technical trade terms involving intricate factual questions and voluminous and conflicting evidence, all of which deprived the court of jurisdiction to hear and determine the issues in advance of preliminary resort to the National Railroad Adjustment Board created by Congress under the Railway Labor Act, 45 U. S. C. A., Section 151, *et seq.*, as the specialized agency for the determination in the first instance of disputes of the character alleged and shown.

X

2126 That practically the entire decree was based not upon a construction of the contract but upon opinion testimony of the Railroad's officials as to their own practices, technical interpretations and other matters outside of the contract and largely at variance therewith; whereby, it is submitted, his Honor erred in granting in its entirety the declaratory judgment prayed by plaintiff, but should have held as matter of

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law and in the exercise of his discretion that the case falls without the scope of declaratory judgment procedure and that such technical railroad practices and the like should, at least in the first instance, be passed upon and the contract be construed by the National Railroad Adjustment Board, composed of technical experts better equipped than the Courts to deal with such intricate technical questions of fact lying outside of and beyond the terms of the contract.

2129

XI

That his Honor erred in refusing defendant's motion to dismiss the action made at the close of all the evidence in the case, whereas he should have held that the Declaratory Judgment Act of South Carolina (1942 S. C. Code, Section 660) did not give the court jurisdiction to construe and interpret a contract between an interstate carrier by rail and the duly certified bargaining representative of its employees relating to rates of pay, rules, and working conditions, and that jurisdiction for determining controversies relative to the application or interpretation or construction of the contract in the first instance is exclusively within the Adjustment Board provided by the Railway Labor Act, 45 U. S. C. A. 151 *et seq.*

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2131

XII

That his Honor erred in refusing to sustain defendant's objections to the jurisdiction of the court, the error being that the court in retaining jurisdiction to determine disputes between an interstate carrier by rail and the duly certified representative of its employees has erroneously construed the Railway Labor Act, 45 U. S. C. A., Section 151 *et seq.*, in a way not

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Southern Rwy. Co. v. Order of Rwy. Con. of America in accord with applicable decisions of the Supreme Court of the United States, and particularly the decisions of the United States Supreme Court in *Order of Railway Conductors v. Pitney*, 66 Sup. Ct., 322; *General Committee, etc., v. Missouri-Kansas-Texas R. Co.*, 320 U. S., 323; *General Committee, etc., v. Southern Pacific Company*, 320 U. S., 338; *Switchmen's Union of North America v. National Mediation Board*, 320 U. S., 297; *Moore v. Illinois Central Railroad Company*, 321 U. S., 754; *Great Northern Railroad Company v. Merchants Elevator Company*, 259 U. S., 285, and *Mitchell Coal Co. v. Pennsylvania R. Co.*, 230 U. S., 247.

XIII

That his Honor in exercising his discretion to grant the declaratory judgment sought by Plaintiff erred in construing the Railway Labor Act in a way not in accord with and contrary to applicable decisions of the Supreme Court of the United States.

XIV

That his Honor erred in retaining jurisdiction and awarding judgment under the South Carolina Declaratory Judgment Act (Code S. C. 1942, Sec. 660) in that the said Act, if so construed or applied as to permit or authorize the declaratory judgment rendered in this action, is null and void as contrary to Article 1, Section 8, Subdivision 3 of the Constitution of the United States conferring on Congress power to regulate commerce among the several States and with the Act of Congress enacted thereunder known as the Railway Labor Act, 48 U. S. Statutes at Large, page 1195, 45 U. S. C. A., Sec. 151 *et seq.*

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XV

That his Honor erred in rendering his decree in favor of Plaintiff, the error being that said decree relieves Plaintiff of its duties to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions and to settle all disputes whether arising out of the application of the agreement or otherwise, and deprives this defendant of the right to bargain collectively concerning said dispute and other similar disputes or claims which may arise in the future, contrary to the provisions of the Railway Labor Act.

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2138

XVI

That his Honor erred in holding

“Statistics from the annual reports of the National Railroad Adjustment Board to Congress for the year 1944, 1945 and 1946 introduced by plaintiff show that that Board has a very large backlog of cases and that it would take several years to secure a decision or award, which would still be subject to a court review entailing a trial *de novo*. It thus appears that that administrative remedy is not speedy and adequate. On the other hand, this court is in a position now to make a binding and final declaration that will settle the controversy between plaintiff and defendant.”

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the error assigned being that as a conclusion of law the said holding is erroneous and misconstrues the Railway Labor Act, and as a finding of fact it is unsupported by the evidence.

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B. *As to the Merits.*

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XVII

2141 That his Honor erred in holding:

“There is no provision in the contract for extra compensation in the case of industrial switching”;

whereas he should have held that so-called “industrial switching” is not mentioned anywhere in the contract, one way or the other, but that under the “basic day rule”, Section 5(a) and (b) of the contract (schedule, plaintiff’s Exhibit 12) as interpreted and applied in practice by the railroad and its conductors, an additional day’s pay is allowed when a conductor is required to make an additional run beyond, outside of, or off his assigned run, and the mere fact that the added run or side trip terminates in “industrial” switching, is wholly immaterial and cannot alter the character of the additional run as a service, separate and apart from the assigned run and regular pay therefor, for which compensation must be paid as provided in Rule 5(a) unless a different rate is negotiated by special agreement.

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XVIII

2144 That his Honor erred in holding:

“There has been no showing whatsoever by the defendant of any ‘former accepted and agreed to practices, working conditions or interpretations’ to support their claim that Article 5(a) of the contract provides for additional compensation over and above that for the service trip when a crew performs industrial switching or service on a track such as that at Pregnall, S. C. On the other hand, the evidence is clear that industrial switch-

2144

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ing has been performed over a long period of time by local freight crews as part of their regular work, and has never been the basis for extra compensation except in a few cases where the parties have negotiated a special agreement providing for such payment";

whereas he should have held that where runs in addition to or beyond an assigned run are required of conductors, the accepted practice, admitted by plaintiff's witnesses, entitled the conductors under Art. 5 (a) to an extra day's pay for the side run off from Pregnall, that the burden of proof was not upon defendant but upon plaintiff, that plaintiff had failed to show either an express provision in the contract or an accepted and agreed to practice supporting plaintiff's theory, and that the very fact that in some cases "the parties have negotiated a special agreement providing for such payment" proves that there has never been a practice accepted and agreed to by the conductors agreeing to non-payment for such services, and that on the contrary, both parties have recognized that conductors were entitled to additional compensation for services performed outside of and apart from their assigned runs and regular pay therefor.

XIX

That his Honor erred in holding:

"Another class of examples relied on by defendant were situations where the conductors had been required to perform service beyond and after reaching the terminal of their assignment. Typical of such examples was a hypothetical one where the crew, on the Charleston-Branchville local

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2149

freight run was required to go several miles beyond the terminal at Branchville to perform some service. Such cases would apparently constitute a violation of Article 5 because by its very terms a straightaway run is a run from one terminal to another and the crew would have completed its run on reaching the terminal at Branchville. The evidence, however, establishes the fact that Pregnall is not a terminal and the service on the industrial tract of the Ancor Corporation could not be beyond a terminal.”;

2150

the error being that as concerns the work and compensation of conductors it is as much a violation of Article 5 to run a conductor off of his assigned straightaway run on the side as it is to run him off on the end.

XX

That his Honor erred in limiting the meaning of the basic day rule (Article 5(a)) and holding:

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“Article 5(a) merely provides that a conductor going on duty and performing services must be paid a minimum day’s pay of ‘100 miles or less, eight hours or less’.”

2152

the error being that such over-simplification is true only when applied to services performed by a conductor within his assignment on a “straightaway or turn around” run and has never been construed or applied to require services outside of his assignment even though the total be less than 100 miles or requires less than eight hours time, whether such additional services be that of adding a turn-around to a straightaway, or an additional side run tacked on to a straightaway run, or a run beyond a terminal, or a lapback on a

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straightaway run, and all such additional service is treated as a new run for which a basic day's pay must be allowed under Rule 5(a) in the absence of negotiation of a special agreement for a different rate of compensation for such additional service. 2163

XXI

That his Honor, in holding:

"As to the cases involving a 'lap back trip', no such item appears in the contract and the testimony showed clearly that it had never been recognized by plaintiff that such a movement entitled a conductor to extra pay until an agreement known as the 'lap back agreement of July 30, 1945' was negotiated and executed in 1945. The definition of that term agreed to in 1945 did not cover such service as was performed on the tracks at Pregnall, South Carolina." 2164

erred in not holding that lapback movements had been claimed and compensated as additional trips outside the regular assignment prior to the lapback agreement of July 30, 1945, and were similar in principle to "side trips", all such trips being outside and beyond the regular assignment and regular pay therefor, and under agreed to and accepted practices have been treated as a new trip compensable as a basic day under Rule 5(a). 2165

XXII

That his Honor erred in holding:

"The third class of cases testified to by defendant's witnesses were those of situations where special agreements had been negotiated. Typical 2166

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2157 of these was an agreement to make an extra payment to crews serving the yard tracks at Blair, Tennessee, which serve the government atomic bomb plant. Such special agreements cannot, however, affect the questions under consideration here. The parties are, of course, free to negotiate special agreements to provide special payments to cover specific cases, but by doing so the general provisions of the basis contract are in no way changed in their application to other cases.”

2158 and at the same time deciding that the conductors are not entitled to any extra compensation when required to make additional side runs and perform services beyond those bulletined and assigned because of former accepted or agreed to practices, usages or interpretations and that the questions under consideration are not affected by such instances of negotiated settlements as at Blair, Tennessee; whereas he should have held that the existence of such disputes and the necessity of composing such differences by negotiated agreements, instead of proving Plaintiff's theory or a practice of the Conductors to acquiesce therein, dis-
2159 prove the same and negative the supposed basis for his Honor's declaratory judgment by establishing that it was not a practice for the conductors to perform such extra services without demanding extra compensation, as shown by the very fact that such claims were made, disputes similar to the present arose and they had to be negotiated.

XXIII

2160 That his Honor erred in holding in favor of Plaintiff on the ground among others that

“There is no testimony and it is not claimed that any of these named exceptions in Article 28

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provide for extra compensation over and above the regular day's pay for local freight conductors required to perform industrial switching on the track serving the Aneur Corporation at Pregnall, S. C.";

the error being that the Aneur Corporation was not at Pregnall but was off to the side two miles beyond the Town of Harleyville and over Six and a quarter miles from Pregnall, the services required necessitated a long run and other services in addition to switching, and the point was not that the present case fell within one of those exceptions but that the existence of similar exceptions, such as those shown at pp. 57, 58, 59, 61, 62 and 80 of the Contract, refute Plaintiff's theory and show that it was not an accepted and agreed to practice or interpretation for conductors to perform such additional services without demanding additional compensation and that the conductors have not acquiesced in the same, the burden of showing which was upon Plaintiff.

XXIV

That his Honor erred in giving no effect to the requirement in the contract (Schedule Plaintiff's Exhibit 12, Art. 26 (b) (2), p. 37) that a new run must be bulletined; whereas he should have held that Plaintiff had no right to add an additional side run, not bulletined, of over six and a quarter miles each way to the bulletined run between Charleston and Branchville, and that the mere device of calling the additional run "industrial switching" was not sufficient to justify the imposition of this additional run upon the conductors without *any* additional compensation.

XXV

2165

That his Honor erred in holding that

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“the conductors were paid for all time on duty continuously from the time they went on duty at their initial terminal until the time they went off duty at their final terminal, including the time they spent at Pregnall and on the tracks serving the Ancor Corporation. The conductors were paid for each service trip at least a minimum day’s pay (\$9.10) for 100 miles or 8 hours and in addition thereto time and one-half pay for any time spent on duty over and above 8 hours”;

whereas he should have held that the plaintiff had no right to treat an additional run off of the assigned run upon a time basis in violation of the Basic Day Rule, Art. 5(a) & (b), in that the imposition of a long side run prevented said run being a simple “straight-away” run and constituted a new assignment not bulletined, coupled with a violation of Art. 26 (b)-2 requiring new runs to be bulletined before conductors bid upon the same.

2167

XXVI

That his Honor erred in holding:

“Article 6 provides that his” (the conductor’s) “day begins from the time he goes on duty at the initial terminal and continues until he goes off duty at the final terminal. In other words, he is to be paid for all time on duty on a continuous time basis. There is no provision for interrupting the time under the circumstances”;

2168

whereas he should have held that the purpose of said Article was to define the beginning and ending of the

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day merely for the computation of overtime, if any, that might accrue to a conductor on duty on an assigned run, and that said article affords no basis and has never been construed under accepted and agreed to practices as implying an intention to impair or modify Article 5(a) and (b) and Article 26 (b) (2) or for creating exceptions thereto so as to permit plaintiff to impose runs additional to those assigned and bulletined and treat the same on a time basis as part of the assigned run as if no new or additional run were involved.

2169

XXVII

2170

That his Honor erred in adopting Plaintiff's theory that so-called "industrial switching" was a different thing and to be treated differently from switching or side runs for other purposes than industrial and therefore rendered non-compensable, when such treatment was not required by the terms of the contract, and in thereby creating an unwarranted exception to the interpretation and practice of paying conductors for additional trips, services or side runs beyond or outside of their assigned runs.

2171

XXVIII

That his Honor erred in holding:

"The evidence clearly showed that the track serving the Ancor Corporation has all the characteristics of an industrial track. It is used only for the purpose of serving a private industry (or industries the plant of the Volunteer Cement Company being served thereon since this suit was filed); it is not open for use of the public; it has no stations on it; no telegraph service; no regular

2172

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trains; no mail or express service; and none of the attributes of main or branch line tracks of a railroad company."

2173

The error assigned is that his Honor accepted, as differentiating so-called "industrial tracks" from main or branch line tracks, factors having no bearing upon and wholly irrelevant to the additional time, work and services required of conductors in running over 13½ miles beyond their assigned run, and that the additional run can be as great or greater on a long "industrial track" than an additional short run on a main or branch line track, which by the undisputed evidence was admitted by plaintiff as entitling the conductor to an extra day's pay, and that plaintiff introduced no evidence and pointed to no rule in the contract to justify any such claimed distinction.

2174

XXIX

That his Honor erred in finding that

"It was proven that the movements on the industrial track were substantially the same as switching service performed on other industrial tracks recognized as a regular part of a local freight run's assignment":

2175

whereas he should have held that apart from and in addition to switching, a side run of from Six and a quarter miles to Six and 85/100 miles each way was necessary before switching operations could be done at either end and that the length of the additional run was so excessive as not to be comparable to the instances where conductors travelled short distances on spur tracks as a part of switching operations without making claims.

2176

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XXX

That his Honor erred in not recognizing that the term "switching" in itself implies the shifting, coupling or uncoupling, and placing of cars and does not include an additional long run of over six and a quarter miles each way with a train of cars already coupled and made up. 2177

XXXI

That his Honor erred in holding:

"Defendant thus has not shown that the industry switching over the industrial track at Pregnall was any different from that of industrial switching that has always been considered a part of a local freight crew's assignment, to be paid for as part of the regular service trip"; 2178

the error being that the burden was on plaintiff and not on defendant and that in fact, while both parties agreed that switching at stations along the line, including switching of industries, was part of the work of a local freight crew, usually referred to as station switching, such station switching does not include side trips of several miles off of the assigned run to get to the place where the switching is to be done, whether it be industrial or otherwise, and that station switching of a few hundred feet, the longest being 1,800 feet, is, in no wise comparable and does not constitute proof of an established and agreed to practice to make runs of six and a quarter miles or more to switch an industry off of the assigned run. 2179

XXXII

That his Honor erred in holding that the train movements performed by conductors for the plaintiff, 2180

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2181 Southern Railway Company, deviating off the assigned run and extending from Pregnall over six and a quarter miles out to the Ancor Corporation plant, two miles beyond the Town of Harleyville, and back again to Pregnall,

2182 “are similar to those performed on innumerable other industry tracks which join plaintiff’s railroad line and have always been accepted and agreed to in practice by the conductors of plaintiff’s local freight trains as part of their service trips and have been performed pursuant to the terms of said contract”,

2183 whereas his Honor should have held that not a single instance was shown in the evidence of a side trip of comparable length accepted to or agreed to in practice by such conductors as a part of their service trips and that a side trip of from twelve and a half to thirteen and seven-tenths miles in all is in nowise or in any degree similar or comparable to station switching operations performed at stations along an assigned run, such switching being performed on spur tracks running a few hundred feet off the main line, (the longest shown in the evidence to be 1,800 feet) and that the plaintiff had wholly failed to adduce any evidence in support of its allegations of an accepted and agreed to practice by conductors to make side trips of several miles in length off an assigned run as part of the regular service trip.

XXXIII

That his Honor erred in finding and holding:°

2184

“As a part of the regular service trips, the conductors in charge of the freight trains on the run

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perform such switching as is necessary over the industrial tracks of the various industries served by plaintiff along this line of railroad, and have been doing so continuously for many years, without demanding or being paid extra compensation."

whereas his Honor should have found and held that while station switching along the line, including the switching of industries at stations along the line on spur tracks (the longest being 1,800 feet), is considered part of the assignment of a local freight conductor, nevertheless movements of several miles off the assigned run, whether it be to perform switching operations at an industry or to perform some other type of service, have never been considered a part of the regular assignment under accepted and agreed to practices and interpretations of the schedule, and particularly Rule 5(a) thereof, and have always been regarded by both plaintiff and defendant as outside the regular assignment of a local freight conductor and as a new trip separate and apart from the regular trip compensable as a new day's work for which a basic day's pay is allowed, unless a different rate of pay for such additional service was negotiated through a special agreement; and his Honor erred in extending such finding to a newly created run to an industry which was not along the line at a station, but located at a distance therefrom of over six and a quarter miles.

XXXIV

That his Honor erred in holding

"Even the defendant's witnesses corroborated plaintiff's evidence that part of the assignment

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of a local freight train is the switching of industrial tracks on route between the terminals”;

whereas defendant's witnesses testified that all station switching incidental to the assigned run, and not because it was “*industrial*”, was a part of the assignment, and such holding begged the question whether a new run, not bulletined, to a point over six and a quarter miles off the assigned route was “*en route*”, was a part of a “*straightaway*” run, and was “*between the terminals*”—Charleston and Branchville—and whether an additional run off of the assigned run of so great length imposed upon the conductor services in addition to switching and whether there is any basis in reason for treating an industrial track of unusual and excessive length as different from any other superadded side trip of the same length, whether beyond an assigned terminal, lapping back toward the initial terminal, or running off to the side from the line of route.

XXXV

That his Honor erred in holding in effect and result that because conductors in connection with station switching operations had traveled insignificant distances without claiming additional compensation, the Plaintiff can require such conductors in addition to switching, to travel over a new side run tacked on to a straightaway run eighteen to twenty times longer than the longest run in existence on this line up to that time, when construction of such new excessive run was not commenced until 1943, put in operation in June, 1944, and on September 7, 1944, the conductors commenced filing claims for such new and additional services so required, and the effect of the broad

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declaratory judgment in the decree under appeal is to preclude the conductors from claiming or bargaining for additional compensation for side runs no matter if Plaintiff requires them to run 25, 50 or any number of miles off of their assigned runs. 2193

XXXVI

That his Honor erred in finding

“It was also shown that there is nothing exceptional about the length of the track, in that there are other acknowledged industrial tracks on the carrier’s railroad of comparable length”; 2194

whereas he should have held to the contrary and that the length of the longest industrial spur shown on the line in question was to the length of the Pregnall-Harleyville-Ancor spur in the ratio of one to eighteen or one to twenty.

XXXVII

That his Honor erred in holding

“Defendant thus has not shown that the industry switching over the industrial track at Pregnall was any different from that of industrial switching that has always been considered a part of a local freight crew’s assignment, to be paid for as part of the regular service trip”; 2196

whereas he should have held that the additional operation out of Pregnall required a long run and services in addition to switching, had not “always” been considered a part of the assignment, was not to be paid for as a part of the regular service trip, had not been bulletined as required by the contract, was objected to by the conductors unless compensation for such addi- 2196

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2197 tional run would be provided, disputes arose in this and similar situations which were resolved by negotiated agreements which showed that the conductors had not acquiesced, and the burden of showing agreed to practices or acquiescence on the part of the conductors rested not upon Defendant but upon Plaintiff.

XXXVIII

That his Honor erred in holding, with reference to Article 7 of the contract (providing for overtime):

2198 "This article, as shown by the testimony, was placed in the contracts by the Director General of Railroads in 1919 as a means of adjusting the pay of men in local freight service, and providing time and one-half rates for hours of service performed in excess of 8 hours. The Article was granted by him on the specific condition that any and all arbitraries and special allowances (extra pay) including those for any work performed en route by a crew would be abolished. According to the testimony, the only way these extra 'arbitrar-
2199 'aries' or payments for work en route were authorized thereafter was by the negotiation and execution of special agreements";

whereas he should have held such matters irrelevant to the case at bar, (1) because the claims of the conductors are not for any work performed "en route", but are for an additional run which was not bulletined as part of their assignment and goes over six miles off the assigned run as separate from and off the assigned route, (2) because the arbitraries referred to by the Director General had reference to
2200 special allowances for services which were recognized

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as a part of the regular assigned run "en route" (such special allowances being discontinued) and had no reference to claims for compensation for runs not part of the regular assignment, and under the contract and accepted and agreed to practice such additional runs have been compensated as a new basic day for services performed outside the regular assignment unless a different rate of compensation is provided by special agreement, (3) because the plaintiff has sought to justify its refusal of payment of the claims of the conductors on the ground of an accepted and agreed to practice that such work was part of the regular assignment of a local freight conductor and having failed to prove any such custom or agreed to practice cannot attempt to rely on an order of the Director General of Railroads issued in 1919, almost a quarter of a century before these claims arose, which had reference only to special allowances for services as part of the regular assignment and did not permit the carrier to require conductors to perform runs outside their assignment without compensation for a basic day and has never been so interpreted as shown by the evidence, and (4) because the testimony does not reveal one single instance in practice where extra compensation for a side trip in addition to switching, such as that performed from Pregnall out to the Ancor plant, has been agreed to by the conductors as being an "arbitrary" or special allowance", or as being for any other reason noncompensable.

XXXIX

That his Honor erred in holding in favor of Plaintiff upon the ground among others that as to Plaintiff's liability to conductors

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2205 "during a year's period the liability would amount to \$2,848. at the rate of pay then effective, or \$3,311 at the current rate of pay. It further appears that if the conductors should ultimately prevail, the plaintiff would also be liable for large sums to other members of those local freight train crews whose contracts have provisions similar to those of the conductors' agreement here involved";

2206 the error being that such considerations are foreign to the issue, show no irreparable injury or damage entitling plaintiff to a declaratory judgment or equitable relief, and confer upon plaintiff no right for any such reason to add additional runs to those assigned without paying additional compensation to the conductors.

XL

2207 That his Honor erred in holding against the Conductors on the ground that their claims were for an additional day's pay plus overtime, that they had not established such, and therefore were not entitled to anything, thereby in effect shifting the burden of proof from plaintiff to defendant and in effect holding that the conductors were either entitled to a whole day's pay plus overtime or nothing; whereas he should have held that, if the conductors were required to perform services in addition to those specifically bulletined and assigned and specifically set forth in the contract and in consequence were entitled to *any* additional compensation even though less than the amount claimed, the Plaintiff had not proved its case and was not entitled to the judgment sought declaring that Plaintiff owes the conductors nothing, and the

2208

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Court erred in depriving the conductors of the right to bargain and negotiate for a lesser amount, which right is specifically conferred upon them by the terms of the Railway Labor Act of Congress. 2209

XLI

That his Honor erred in finding and holding:

“The defendant handled these claims beginning shortly after the filing of the first claim of September 9, 1944, claiming that the performance of the industry switching at the plant of the Ancor Corporation entitled the conductors to an additional day's pay, separate and apart from and in addition to their pay for the local freight service trip between Charleston and Branchville, which claims the plaintiff contends are a violation of the articles of the contract referred to above.” 2210

whereas he should have found and held that the claims filed with plaintiff by the individual conductors for an additional day's pay were not for switching services at Pregnall or at the plant of the Ancor Corporation above Harleyville but were for a “side trip Pregnall to Harleyville Alumina Plant and Return to Pregnall” (plaintiff's Exhibit 1) and that said conductors were claiming that under the contract and accepted and agreed to practices the side trip to Harleyville was an additional run being required by plaintiff beyond the regular assignment and regular pay of said conductors for which plaintiff had refused to compensate them as required by the contract and accepted and agreed to practices thereunder. 2211

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XLII

2213 That his Honor erred in holding

“The question presented by the Complaint is whether certain industrial switching movements to the plant of Ancor Corporation at Pregnall, South Carolina, an intermediate point on plaintiff's railroad line between Charleston and Branchville, are part of the service trips of conductors. . . .”;

2214 whereas he should have held that said plant of Ancor Corporation was not at Pregnall but over six miles away from Pregnall, which fact presented the further question whether additional train movements of such length in addition to switching could be required of conductors without additional compensation.

XLIII

2215 That his Honor erred in allowing over objection the witness Birthright to testify his opinions as to what a bulletin should contain, and varying and contradicting Rule 26 (b) (2), and in admitting over objection similar self-serving opinion testimony of the witnesses Graham and Cox; whereas he should have excluded such testimony as mere opinion and conclusions of the said witnesses and have held that a custom of plaintiff not to comply with the rule was immaterial to the construction of the contract and could not impair the force and effect of the rule.

XLIV

2216 That his Honor erred in admitting in evidence over objection testimony of the witnesses Birthright and

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Cox, giving their opinions as to industrial switching and industrial tracks with their incidents, offered in an attempt to build up a distinction between side runs on such tracks and side runs over other tracks; whereas he should have held that no such distinction was made anywhere in the contract and it was incompetent for the witnesses to add to or vary the terms of the contract in order to escape the effect of the "Basic Day Rule" Art. 5.

XLV

That his Honor erred in admitting in evidence over objection opinion testimony of the witness Cox to explain, vary and ~~contradict~~ the Basic Day Rule, Art. 5 (a), by varying and adding to Rule 7 a limitation upon the scope and effect of Rules 5 (a) and 26 (b) (2), thereby placing everything upon a time basis in disregard of the runs assigned and described in the bulletin and in disregard of admitted custom and practice; whereas his Honor should have excluded such testimony.

XLVI

That his Honor erred in admitting over objection opinion testimony of the witness Birthright as to a supposed distinction between branch line tracks and tracks such as the side run track from Pregnull to Aneor Plant, based on such irrelevant factors as whether stops were made at Harleyville, whether stations were along the track, whether others of the public were served and other factors wholly immaterial to the issues in the case and having no bearing upon the additional work and service newly imposed upon the conductors beyond their assigned straightaway run, or upon their right to additional compensation, or upon the construction of the contract.

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XLVII

That his Honor erred in refusing to admit in evidence defendant's Exhibit "E", which was the duly certified record of the controversy involved in this action pending before The National Railroad Adjustment Board, First Division; whereas he should have held that the same was competent, relevant and entitled to consideration before exercising his discretion to grant a declaratory judgment.

XLVIII

That his Honor erred in refusing to admit in evidence defendant's Exhibit "F", which was certification by the Secretary of the National Railroad Adjustment Board as to the state of their docket, whereas he should have held that the same was competent and relevant in that it tended to refute plaintiff's testimony to the contrary, embodied in the holding in the decree that it would take several years to secure a decision or award from that Board and that the administrative remedy is not speedy and adequate.

STIPULATION

We hereby agree that the foregoing shall constitute the Return and Transcript of Record for appeal to the Supreme Court.

MITCHELL & HORLBECK,
ELLIOTT, SHUTTLEWORTH & INGERSOLL,
V. C. SHUTTLEWORTH,
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W. S. MACGILL,
Attorneys for Respondent.

[fol. 557] IN THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

Case No. 3070. Opinion No. 16254

SOUTHERN RAILWAY COMPANY, a Corporation Organized and Existing under the Laws of the State of Virginia, Respondent,

vs.

ORDER OF RAILWAY CONDUCTORS OF AMERICA, an Unincorporated Association, Appellant

Appeal from Charleston County, William H. Grimball, Judge

Filed August 15, 1949

AFFIRMED

Mitchell & Horlbeck, of Charleston, and Elliott, Shuttleworth & Ingersoll and V. C. Shuttleworth, all of Cedar Rapids, Iowa, for appellant.

Barnwell & Whaley, of Charleston, Frank G. Tompkins, of Columbia, and Sidney S. Alderman, Henry L. Walker and W. S. MacGill, all of Washington, D. C., for respondent.

PER CURIAM:

The well considered decree of the Court below, which will be reported, is affirmed for the reasons therein stated. It is only necessary, therefore, to discuss certain minor questions raised by the exceptions but not referred to or disposed of in this decree.

The Court below denied a motion by appellant to amend its answer by alleging that subsequent to the commencement of this action, this dispute was submitted by appellant to the National Railroad Adjustment Board where it is now pending. Appellant also offered in evidence, and the Court excluded, a certified copy of the file of the First Division of the National Railroad Adjustment Board relating to the claims of the conductors involved in this action which showed that these claims had been submitted to and were still pending before that body. It was held that the fact that the same controversy was pending before the National Railroad Ad-

justment Board constituted no defense to this action. Appellant challenges this ruling and further contends that this was a circumstance to be considered in determining whether the Court should enter a decree on the merits. It was held by this Court on the first appeal (210 S. C. 121, 41 S. E. (2d) 774) that the courts had jurisdiction to determine this controversy and that the remedies provided by the Railroad Labor Act were not exclusive. The fact that this dispute had been submitted by appellant to said Board was shown by other testimony in the case and was no doubt considered by the Court below in determining whether it would enter a declaratory judgment. It has also been given due consideration by this Court. The error, if any, in refusing to allow the amendment and in excluding the testimony mentioned was, for the reasons stated, not prejudicial.

Appellant claims that the Court erred in excluding an affidavit by the Executive Secretary of the First Division of the National Railroad Adjustment Board which was offered for the purpose of showing the number of cases filed with that Division on behalf of the employees of the Southern Railway Company from December 9, 1935 to June 12, 1947, the number disposed of, either by awards entered or cases withdrawn, and the number still pending. This affidavit does not purport to be a certified copy of the docket of the First Division of the National Railroad Adjustment Board. It is a mere tabulation made by the affiant as a result [fol. 558] of the examination of the records in his custody. It was clearly inadmissible. It may not be amiss to state that it is apparently conceded that one statement contained therein is incorrect.

Finally, it is contended that the Court below erred in admitting certain testimony offered by respondent tending to show the interpretations placed upon various provisions of the contract by the parties and the usages and practices which had prevailed over a number of years, it being contended that this testimony tended to vary or add to the terms of the contract. We think the testimony was competent. Indeed, without reservation of objection, testimony along the same line was offered by appellant. The exceptions relating to this question are overruled.

Appellant has argued against our holding in the former opinion that the courts of this State had jurisdiction of the subject matter. It is earnestly contended that the action

should be dismissed for lack of jurisdiction. This question was fully considered on the first appeal and that decision is the "law of the case". We are now not at liberty to review it even if we desired to do so. *Jones vs. Railroad Co.*, 65 S. C. 410, 43 S. E. 884; *Jenkins vs. Southern Railway Co. et al.*, 145 S. C. 161, 143 S. E. 13; *National Bank of Newberry vs. Livingston, et al.*, 164 S. C. 2, 161 S. E. 769; *Cohen vs. Standard Accident Insurance Co.*, 203 S. C. 263, 17 S. E. (2d) 230.

All exceptions are overruled and judgment affirmed.

D. Gordon Baker, C. J.; E. L. Fishburne, A. J.; T. H. Stukes, A. J.; C. A. Taylor, A. J.; G. Dewey Oxner, A. J.

Decree of Judge William H. Grimball

This action was instituted against the defendant by Southern Railway Company in July, 1945, under the declaratory judgment Act of this state, Code, Section 660, for the purpose of obtaining a construction of a written contract between the plaintiff and the defendant, Order of Railway Conductors of America. The question presented by the complaint is whether certain industrial switching movements to the plant of the Ancor Corporation at Pregnall, South Carolina, an intermediate point on plaintiff's railroad line between Charleston and Branchville, are part of the service trips of conductors in charge of local freight trains between Charleston and Branchville; or whether such conductors are entitled to an additional day's pay for performing switching operations to the plant of the Ancor Corporation, separate and apart from and in addition to the pay for their service between Charleston and Branchville.

When this case first came on for hearing in this court, a demurrer to the complaint was sustained on the grounds that the court did not have jurisdiction, and the court in the exercise of its discretion refused to take jurisdiction. The plaintiff appealed this ruling to the Supreme Court of South Carolina which reversed the judgment, holding that "the complaint alleged a cause of action for declaratory relief" and saying:

"In this case, after a hearing upon the merits, the court will exercise its discretion as to whether or not it will make a binding declaration." 41 S. C. (2d) 774, 779.

Following that decision the case came on for trial on the merits in this court. Upon the proof adduced at that trial I find that the following facts have been established:

o The defendant is an unincorporated association engaged [fol. 559] in union activities in Charleston County and is the duly authorized representative of and bargaining agent for the conductors employed by the plaintiff in the operation of the local freight trains on the line of railroad between Charleston and Branchville in all matters involved in and arising under a written contract dated May 16, 1940, between the plaintiff and the defendant entitled "Schedule of Wages and Rules and Regulations for Conductors". There exists an actual and continuing controversy as to the proper construction of this contract, with reference to service performed at Pregnall, South Carolina, by conductors on local freight trains on said line of railroad.

The distance from Charleston to Branchville is 63 miles; the average time consumed on the "straight-away" run of these local freight trains is approximately 6½ hours; the average time on duty of the conductors each day is approximately 8½ hours, the conductors going on duty at Charleston or Branchville as the case may be and being released from duty at the end of the run at the opposite terminal.

As a part of the regular service trips, the conductors in charge of the freight trains on the run perform such switching as is necessary over the industrial tracks of the various industries served by plaintiff along this line of railroad, and have been doing so continuously for many years, without demanding or being paid extra compensation. Conductors in charge of local freight trains have been instructed to perform such industry switching at Pregnall, South Carolina, as may be necessary at the plant of the Ancor Corporation over the privately owned industry tracks ever since their construction in 1943. These tracks connect with the plaintiff's railroad within the yard limits at Pregnall and extend some 6 miles to the plant of the Corporation. This industry switching consists of the local freight trains taking cars the destination of which is the plant of the Ancor Corporation, to the plant, placing the cars on the designated track or tracks, and then picking up and hauling from the plant to the plaintiff's main line any cars destined to other points.

The testimony further establishes that those movements are similar to those performed on innumerable other in-

dustry tracks which join plaintiff's railroad line and have always been accepted and agreed to in practice by the conductors of plaintiff's local freight trains as a part of their service trips and have been performed pursuant to the terms of the said contract.

The basic rate of pay for these conductors in effect at the time of the commencement of the suit (the distance run being less than one hundred miles) was \$9.10 per day for eight hours service or less, and if service exceeded eight hours they were entitled to additional pay for overtime on a minute basis at the rate of \$1.71 an hour. The basic day rate has now been increased to \$10.58, and the overtime rate to \$1.98½ an hour.

The defendant as the duly authorized representative and bargaining agent of the conductors of plaintiff demanded that plaintiff pay additional compensation to the conductors under the contract here involved at the rate of a minimum day's pay, or \$9.10 per day, separate and apart from and in addition to their regular pay of \$9.10 plus overtime for the local freight service each time industry switching service is performed at Pregnall.

The defendant handled these claims beginning shortly after the filing of the first claim on September 9, 1944, claiming that the performance of the industry switching at the plant of the Ancor Corporation entitled the conductors to an additional day's pay, separate and apart from, and in addition to their pay for the local freight service trip between Charleston and Branchville, which claims the plaintiff contends are a violation of the articles of the contract referred to above. The claims were appealed by defendant to the highest officer of the plaintiff authorized to handle such claims and were formally rejected.

The defendant has continued to assert such claims which the conductors have been filing continuously down to the present date so that as a result of the continuing accrual of these claims the plaintiff is faced with a growing potential liability in the event the defendant's claims are justified. [fol. 560] For the period September 7, 1944 to July 14, 1945 alone there were filed some 40 claims for an additional day's pay by conductors. The testimony also shows that if this service were performed on each working day by conductors during a year's period the liability would amount to \$2,848.00 at the rate of pay then effective, or \$3,311.00 at the

current rate of pay. It further appears that if the conductors should ultimately prevail, the plaintiff would also be liable for large sums to other members of those local freight train crews whose contracts have provisions similar to those of the conductors' agreement here involved. It is thus clear that unless this controversy is settled the plaintiff will be subjected to substantial injury and damage.

Articles 5, 6 and 7 of the contract here under consideration establish the basis of the compensation to be paid to conductors in this local freight service and are as follows:

"ARTICLE 5

"Basic Day

"(a) In all road service, except passenger, 100 miles or less, 8 hours or less (straightaway or turn-around), shall constitute a day's work; miles in excess of 100 will be paid for at the mileage rates provided, except as provided for in Article 28.

"(b) In through freight or mixed train service, a straightaway run is a run from one terminal to another terminal; and not less than one hundred miles will be allowed for each such run, except as provided for in Article 28.

"ARTICLE 6

"Beginning and Ending of Day

"In all classes of service, other than passenger, conductors' time will commence at the time they are required to report for duty and shall continue until the time they are relieved from duty at end of run.

"ARTICLE 7

"Overtime

"In all service, except passenger, runs of 100 miles or less, overtime will begin at the expiration of 8 hours; on runs of over 100 miles overtime will begin when the time on duty exceeds the miles run divided by $12\frac{1}{2}$. Overtime shall be paid for on the minute basis, at a rate per hour of three-sixths of the daily rate, as shown in Article 4, Sections (a), (b) and (c)."

Article 5 (a) merely provides that a conductor going on duty and performing service must be paid for a minimum day's pay of "100 miles or less, 8 hours or less".

Article 6 provides that his day begins from the time he goes on duty at the initial terminal and continues until he goes off duty at the final terminal. In other words, he is to be paid for all time on duty on a continuous time basis. There is no provision for interrupting the time under any circumstances.

Article 7 awards the conductors pay at time and one-half rates for all time on duty in excess of 8 hours on runs of less than 100 miles which is the case on the Charleston-Branchville run. This article, as shown by the testimony, was placed in the contracts by the Director General of Railroads in 1919 as a means of adjusting the pay of men in local freight service, and providing time and one-half rates for hours of service performed in excess of 8 hours. The article was granted by him on the specific condition that any and all arbitraries and special allowances (extra pay) including those for any work performed enroute by a crew, would be abolished. According to the testimony, the only way these extra "arbitraries" or payments for work en-[fol. 561] route were authorized thereafter was by the negotiation and execution of special agreements.

There is no provision in the contract for extra compensation in the case of industrial switching.

In Article 28 of the contract we find a general rule providing for "Exceptions". These exceptions provide for special arrangements for the basis of compensating crews on "circus trains", "good roads, agricultural cars, etc.", and certain specified "excepted runs", that would otherwise be governed by general provisions of the contract including Articles 5, 6 and 7. There is no testimony and it is not claimed that any of these named exceptions in Article 28 provide for extra compensation over and above the regular day's pay for local freight conductors required to perform industrial switching on the track serving the Ancor Corporation at Pregnall, S. C.

Another provision of the contract which appears to be involved is in the next to last paragraph of the contract (page 67) under the heading "Terms of Agreement", as follows:

"This agreement supersedes and cancels all former agreements but does not, except where rules are changed,

alter former accepted and agreed to practices, working conditions or interpretations."

There has been no showing whatsoever by the defendant of any "former accepted and agreed to practices, working conditions or interpretations" to support their claim that Article 5 (a) of the contract provides for additional compensation over and above that for the service trip when a crew performs industrial switching or service on a track such as that at Pregnall, S. C. On the other hand, the evidence is clear that industrial switching has been performed over a long period of time by local freight crews as part of their regular work, and has never been the basis for extra compensation except in a few cases where the parties have negotiated a special agreement providing for such payment.

The contract further provides the proper procedure for making a change or amendment to its terms as follows:

"This agreement is effective as of May 16, 1940, and cancels all other rules in conflict herewith and is to remain in effect until revised or abrogated by thirty (30) days written notice from either party to the other, and in accordance with provisions of the amended Railway Labor Act."

For the service trips made by the local freight trains in question, it has been established that the conductors were paid for all time on duty continuously from the time they went on duty at their initial terminal until the time they went off duty at their final terminal, including the time spent at Pregnall and on the tracks serving the Ancor Corporation. The conductors were paid for each such service at least a minimum day's pay (\$9.10) for 100 miles or 8 hours and in addition thereto time and one-half pay for any time spent on duty over and above 8 hours.

Defendant contends that the service performed on the private track at Pregnall for the Ancor Corporation was outside the assignment of the conductors on the local freight trains in question and constituted "side trips" or "lap back trips" for which they were entitled to an extra and additional day's pay under the provisions of Article 5 (a) of the contract quoted above.

It has been clearly established that the conductors on the runs in question were on local freight service assignments

running between Charleston and Branchville, the terminals of the run, with Pregnall as an intermediate non-agency station. Even the defendant's witnesses corroborated plaintiff's evidence that part of the assignment of a local freight train is the switching of industrial tracks en route between the terminals.

[fol. 562] The evidence clearly showed that the track serving the Acor Corporation has all the characteristics of an industrial track. It is used only for the purpose of serving a private industry (or industries, the plant of the Volunteer Cement Company being served thereon since the suit was filed); it is not open for the use of the public; it has no stations on it; no telegraph service; no regular trains; no mail or express service; and none of the other attributes of main or branch line tracks of a railroad company. It was also shown that there is nothing exceptional about the length of the track, in that there are other acknowledged industrial tracks on the carrier's railroad of comparable length. Likewise it was proven that the movements on the industrial track were substantially the same as switching service performed on other industrial tracks recognized as a regular part of a local freight run's assignment.

Defendant's witnesses testified to three types of cases to show that the service on the track at Pregnall was a "side trip", "lap back trip", or "turnaround" for which an additional day's pay accrued because the crew was taken outside its assignment.

As to the cases involving a "lap back trip", no such item appears in the contract and the testimony showed clearly that it had never been recognized by plaintiff that such a movement entitled a conductor to extra pay until an agreement known as the "lap back agreement of July 30, 1945" was negotiated and executed in 1945. The definition of that term agreed to in 1945 did not cover such service as was performed on the tracks at Pregnall, South Carolina.

Another class of examples relied on by defendant were situations where the conductors had been required to perform service beyond and after reaching the terminal of their assignment. Typical of such examples was a hypothetical one where the crew on the Charleston-Branchville local freight run was required to go several miles beyond the terminal at Branchville to perform some service. Such cases would apparently constitute a violation of Article 5

because by its very terms a straightaway run is a run from one terminal to another and the crew would have completed its run on reaching the terminal at Branchville. The evidence, however, establishes the fact that Pregnall is not a terminal and the service on the industrial track of the Ancor Corporation could not be beyond a terminal.

The third class of cases testified to by defendant's witnesses were those of situations where special agreements had been negotiated. Typical of these was an agreement to make an extra payment to crews serving the yard tracks at Blair, Tennessee, which serve the government atomic bomb plant. Such special agreements cannot, however, affect the questions under consideration here. The parties are, of course, free to negotiate special agreements to provide special payments to cover specific cases, but by doing so the general provisions of the basic contract are in no way changed in their application to other cases.

Defendant thus has not shown that the industry switching over the industrial track at Pregnall was any different from that of industrial switching that has always been considered a part of a local freight crew's assignment, to be paid for as part of the regular service trip.

Based on the facts reviewed above, it is clear that the plaintiff has made out a case for declaratory relief. The proof supports all the allegations of the complaint, concerning which the Supreme Court said in its opinion on the earlier appeal in this case that "the complaint alleged a cause of action for declaratory relief." *Southern Ry. Co. vs. Order of Railway Conductors of America*, 41 S. E. (2d) 774.

In its answer the defendant alleges that this court does not have jurisdiction or at least should not take jurisdiction of this case because there is available the remedy provided by the Railway Labor Act, 45 U. S. C., Sec. 151 et seq.

The effect of the Railway Labor Act and of the remedy [fol. 563] afforded thereunder before the National Railroad Adjustment Board on this matter of jurisdiction has already been decided by the Supreme Court which said in part after reviewing the pertinent decisions:

"In view of these decisions, it is our opinion that the Congress intended that controversies of the character set forth in this case may be adjusted in either of two ways: First under authority of the Act by submitting the dispute

to the National Railroad Adjustment Board; or second, by exercising the common law rights of any party to bring an action to construe a contract and have his rights declared. There is a concurrent jurisdiction of the subject-matter of a suit of this kind, either by a court of competent jurisdiction or by the National Railroad Adjustment Board." (41 S. E. (2d), 774, 778.)

And then, after quoting the South Carolina declaratory judgment Act (1942 Code, Sec. 660), the Supreme Court said:

"As a sanction for the maintenance of this action and for the relief demanded, the appellant comes squarely within the provisions of this section of the Code." (779.)

It is therefore the law of this case that this court has jurisdiction notwithstanding the remedy provided by the Railway Labor Act. It may be noted in passing that the same conclusion was reached by the Federal Court, when this case was remanded to the State Court (*Southern Railway Co. vs. Order of Railway Conductors*, 63 F. Supp., 306). This leaves only the question of whether the court will in the exercise of its discretion make a binding declaration, which the Supreme Court specifically left open for decision by the Trial Court after a hearing on the merits.

As has already been pointed out by the Supreme Court, all the necessary parties are before the court, the situation giving rise to the controversy is local to South Carolina, and all necessary witnesses were available to the parties at the trial. Moreover, under the facts of this case, no other remedy exists under the laws of this State except that which is now claimed by the plaintiff. This leaves only for consideration the existence of the remedy before the National Railroad Adjustment Board as it might effect the exercise of this court's discretion. As to this the Supreme Court has provided a guide. It said:

"That another remedy may exist, and that other relief may be available to the plaintiff, are factors to be considered by the court. However, before declaratory relief may be denied, in the discretion of the court, on the ground of the existence of other remedies, it must clearly appear that the asserted cumulative remedies are not only available to the plaintiff, but that they are speedy and adequate, or

as well suited to the plaintiff's needs as declaratory relief." (41 S. E. (2d), 774, 779.)

Statistics from the annual reports of the National Railroad Adjustment Board to Congress for the years 1944, 1945 and 1946 introduced by plaintiff show that that Board has a very large backlog of cases and that it would take several years to secure a decision or award, which would still be subject to a court review entailing a trial de novo. It thus appears that that administrative remedy is not speedy and adequate. On the other hand, this court is in a position now to make a finding and final declaration that will settle the controversy between plaintiff and defendant.

The character and inadequacy of the procedure of the National Railroad Adjustment Board are likewise shown in the following excerpt from the opinion of the Third Circuit Court of Appeals in the case of *Dahlberg vs. Pittsburg and L. E. R. Co. et al.*, 138 Fed. (2d), 121:

"The appellants now argue (although the point was not raised before the District Court) that under the Railway Labor Act of 1934, 45 U. S. C. A., 151 et seq., the Court was without jurisdiction to review the award on its merits, its function being merely to decide the single question [fol. 564] whether the award was within the statutory or constitutional authority of the Board. Their contention is based exclusively upon a provision of Sec. 3(m) of the Act, that the awards of the Board 'shall be final and binding upon both parties to the dispute.'

"In construing a statute, words may not be taken out of their context and endowed with an absolute quality nor may the plan of the entire statute be disregarded in interpreting any single provision. Obviously the expression 'final and binding' has its limitations. Even the appellants concede that the award is neither so final that it may not be set aside by the Court if the Board acted beyond its statutory authority nor so binding that the carrier can be compelled to obey it without the aid of the Court in enforcement proceedings. We think that the general plan of the statute clearly discloses an intention to use the words in the sense that the award is the definitive act of a mediative agency, binding until and unless it is set aside in the manner prescribed, and that it was intended that the Court should

exercise broader powers than merely directing coercive process to issue if satisfied that the proceeding was authorized by law."

Then it was said:

"If it could be assumed that the Adjustment Board was a governmental agency still other doubts as to the Act's constitutionality would be present, for example, the question whether there is such a lack of safeguards in the procedure before the Board as to amount to a denial of due process, there being no Court review of the merits. This point was dealt with by Justice Rutledge in the *Washington Terminal Co. vs. Boswell*, supra (124 F. (2d), 235), as follows: 'Much of the argument has been built around the alleged inadequacy of the administrative proceeding as complying with the requirements of due process, particularly in the absence of formal pleadings, opportunity for examining witnesses and cross examining them, opportunity for representation by counsel and for oral argument. These things would be important, if the Board's decisions were final in the legal sense and for purposes of enforcement, as to either facts or law. But, as has been shown, they have no such quality.' "

In conclusion:

"The *Washington Terminal* case, supra, did not, it is true, directly involve this question, the point decided by it being that the employer might not, prior to enforcement proceedings by the employees, review an adverse award by means of an action for a declaratory judgment. However, the majority opinion said, and reiterated, that the enforcement proceeding was a *suit de novo* in which the employer was not limited in its defenses to matters stated in the award and that the findings of the Board did not have finality as to either facts or law. It is evident that a vast deal of careful study and elaborate attention was devoted to the writing of the opinion. Its dicta are persuasive and leave no doubt that it was indeed the considered opinion of the majority that awards are not final and binding to the extent which the appellants here contend." (Emphasis added.)

An analogous case to that now under consideration is *Delaware, Lackawanna and Western R. Co. vs. Slocum*,

183 Misc., 454, 50 N. Y. S. (2d), 313, 57 N. Y. S. (2d), 65, and 56 Fed. Supp., 634, which was mentioned by the South Carolina Supreme Court in its earlier opinion in this case. In the Slocum case the New York Court exercised its discretion in favor of granting declaratory relief in a controversy between a railroad and its employees over the interpretation of a collective bargaining contract.

It is not considered necessary to review here the federal decisions on the effect of the remedy provided by the Railway Labor Act inasmuch as the Supreme Court has already considered them fully in its opinion which established the law of this case.

The court is of the opinion that the remedy provided [fol. 565] by the Railway Labor Act is not such as would require it to deny a declaration of the rights of the parties in this case, in the exercise of its discretion, and that the plaintiff is entitled to the relief prayed for in its complaint. Of course, if the defendant is not satisfied with the present provisions of the agreement, it is free to initiate amendments or changes by following the procedure provided in the last paragraph of the contract, and undertake to secure the desired relief by the normal processes of collective bargaining.

It Is Therefore Ordered, Adjudged and Decreed that:

1. Under the terms of the contract of May 16, 1940, between the plaintiff and defendant:

(a) The movements on the private track serving the plant of the Ancor Corporation at Pregnall, South Carolina, are industrial switching and constitute a part of the service trips of the conductors of the local trains between Charleston and Branchville.

(b) Plaintiff is obligated to pay conductors for the service trips of local freight trains between Charleston and Branchville, including the work on the track serving the Ancor Corporation at Pregnall, South Carolina, the applicable and governing compensation specified in the provisions of Articles 4, 5, 6 and 7.

(c) Conductors are not entitled to an additional day's pay or any other additional compensation separate and apart from the pay for their service trip from Charleston to Branchville for performing switching on the track at Pregnall, South Carolina.

2. Plaintiff has fully paid the local freight conductors for their services while operating the local freight trains which performed services at Pregnall, South Carolina, that resulted in the controversy between plaintiff and defendant over the construction of the contract of May 16, 1940.

3. Plaintiff is under no legal liability to satisfy the claims or any similar claims which have been made or may be made by defendant for extra compensation for conductors of local freight trains for performing industrial switching on the tracks serving the Ancor Corporation at Pregnall, South Carolina.

[fol. 566] IN THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

SOUTHERN RAILWAY COMPANY, a Corporation Organized and Existing Under the Laws of the State of Virginia,
Respondent,

vs.

ORDER OF RAILWAY CONDUCTORS OF AMERICA, an Unincorporated Association, Appellant

Appeal from Charleston County

Honorable William H. Grimball, Judge

Case No. 3070

Opinion No. 16254—Filed August 15, 1949

AFFIRMED

PETITION FOR STAY OF REMITTITUR TO PERMIT APPLICATION FOR A WRIT OF CERTIORARI OR APPEAL TO THE SUPREME COURT OF THE UNITED STATES

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the State of South Carolina:

The Petition of Appellant, Order of Railway Conductors of America, respectfully shows:

[fol. 567] 1. That the Honorable, the Supreme Court of the State of South Carolina, which is the highest Court of the State of South Carolina, on the 15th day of August, 1949,

filed Per Curiam its opinion and final judgment against the Appellant, your Petitioner, affirming the decree below by which, after a hearing on the merits, had been entered a declaratory judgment, holding and declaring and finally adjudging that the Respondent, Southern Railway Company, does not owe the individual conductors represented by Appellant, Order of Railway Conductors of America, the additional pay claimed by the conductors and is not liable to satisfy such claims or any similar claims which have been or may be made, as more fully and particularly set forth in said-decree, a copy of which is officially appended to the said opinion and final judgment of this Honorable Court as a part thereof.

2. That your Petitioner could not have sued out an appeal nor have applied for a Writ of Certiorari to the Supreme Court of the United States from the former opinion and decision of this Honorable Court filed 13th February, 1947, and reported in 41 S. E. 2d 774, 210 S. C. 121, for the reason that said decision was not a final judgment in that the same reversed an order of the Court of Common Pleas which had sustained a demurrer to the complaint and sent the case back to that Court for a trial upon the merits.

3. That your Petitioner, as appears from its position taken and grounds urged at the trial below and in its Brief and oral argument upon appeal in this Honorable Court, has at all times in this cause diligently preserved its position as to the jurisdictional and Federal questions involved and has incurred considerable expense so that in the event of an adverse final decision in this Honorable Court, which event has now occurred, your Petitioner would be enabled to have the Federal Questions, jurisdictional and otherwise, involved in the action carried up to and determined by the Supreme Court of the United States to the end that such questions might be finally set at rest by the Supreme Court [vol. 568] of the United States, and your Petitioner has determined and now in good faith desires and intends as soon as possible within the time allowed by law to Petition to the Supreme Court of the United States by Application for a Writ of Certiorari or by Appeal for a review of the said final decision of this Honorable Court filed on the 15th day of August 1949, and, in the event the said Supreme Court of the United States shall allow the said Writ, dili-

gently to prosecute such appeal or proceeding for review to a final conclusion in the Supreme Court of the United States.

4. Your Petitioner further shows that the questions directly involved as to how far the Congress of the United States in the enactment of The Railway Labor Act, 45 U. S. C. A. Section 151 et seq., did or did not intend disputes concerning rates of pay and working conditions between carriers by Rail in Interstate Commerce and their employees to be submitted to the National Railroad Adjustment Board exclusively, or concurrently with the Courts of the several States in proceedings for declaratory judgments, or only in the Courts to the exclusion of the said Board or whether, if the Courts have concurrent jurisdiction with the said Board, the rule of prior resort to the said Board applies, and whether the situation revealed in the present case falls within the rule of *Moore v. Illinois Central Railroad* (112 F. 2d 959) 312 U. S. 630, 61 S. Ct. 754, or the rule of *Order of Railway Conductors v. Pitney*, 326 U. S. 561, 66 S. Ct. 322, are all Federal Questions, arising out of the interpretation of the said Act of Congress known as the Railway Labor Act, enacted by the Congress in the exercise of its paramount power and authority over Interstate Commerce to promote and maintain peaceful labor relations within the Railroad World by providing means and procedures for the settlement of such disputes

5. Your Petitioner further shows, as appears from the Briefs on both sides filed in this Honorable Court, that the said questions are of importance to both the Carriers and [fol. 569] their Employees, the state of the authorities is conflicting and confused, and cases are coming up in different parts of the country with inconsistent results, as further evidenced by the fact that when this Honorable Court gave special permission to each side to cite a decision in another case rendered since the oral argument in this case, counsel for Appellant cited by letter of April 6th, 1949, the case of *Illinois Central Railroad Co. v. Brotherhood of Railroad Trainmen, Order of Railway Conductors of America, et al.* (D. C. N. District Ill. March 31, 1949 No. 48 C 1218), holding one way, and opposing counsel cited a decision of Judge Webster of the District Court in Denver, Colorado, in the case of *The Denver and Rio Grande Western Railroad Co.*

against the same defendants, holding the opposite; and that it is manifestly to the public interest as well as to the interest of those engaged in Interstate Commerce by Rail that the diffusive and uncertain procedures and questions of jurisdiction which have resulted from confused and conflicting decisions shall be made to give place to a more enlightened, stable and uniform procedure for the settlement of such railway labor disputes and an end be given to needless uncertainty, which consummation devoutly to be wished can be achieved only by the Supreme Court of the United States.

6. That in order for your Petitioner to make such application to the Supreme Court of the United States and obtain a writ of Certiorari to review the said declaratory judgment herein it is necessary or proper that the execution and enforcement of the aforesaid declaratory judgment against your Petitioner, Order of Railway Conductors of America, be stayed for a reasonable time.

7. Inasmuch as the final judgment in this case is purely declaratory and does not direct the payment of any money or the performance of any further act by anyone, your Petitioner submits that to grant a stay of the Remittitur for the purposes aforesaid cannot in any way prejudice or [fol. 570] impair the position of Respondent, in that unless or until the Supreme Court of the United States shall review and reverse the said declaratory judgment, which does nothing more than declare and adjudge, the said declaratory judgment remains in full force and effect, so that the stay prayed for by your Petitioner is merely procedural rather than operating as a supersedeas as regards anything which might or would be done but for such stay; and your Petitioner stands ready to give such security for the protection of the Respondent as the Court may require if the Court shall deem it necessary or proper.

WHEREFORE, your Petitioner prays that it may please this Honorable Court to stay the Remittitur which would otherwise be sent down to the Court of Common Pleas and that the execution and enforcement of the said declaratory judgment be stayed pursuant to the Acts of Congress in such case made and provided, in order that Petitioner may be allowed a period of Ninety (90) days from the entry on August 15, 1949, of said final declaratory judgment of the Supreme

Court of South Carolina wherein to file in the Supreme Court of the United States an application for a Writ of Certiorari or Appeal to review the final decision of this Honorable Court rendered August 15th, 1949, and for all such other and further procedures and the issue and filing of all such orders and papers as may be necessary or proper to facilitate such review by the Supreme Court of the United States.

Respectfully submitted, Mitchell & Horlbeck; Elliott, Shuttleworth & Ingersoll; V. C. Shuttleworth, by Frederick H. Horlbeck, Attorneys for Petitioner.

Frederick H. Horlbeck, of Counsel.
Charleston, S. C., August 20th, 1949.

[fol. 570a] [Endorsed:] The State of South Carolina in the Supreme Court. Southern Railway Company, a corporation, etc., Respondent, vs. Order of Railway Conductors of America, an unincorporated Association, Appellant. Appeal from Charleston County, Honorable William H. Grimball, Judge. Case No. 3070, Opinion No. 16254. Petition for Stay of Remittitur to Permit Application for a Writ of Certiorari or Appeal to the Supreme Court of the United States.

[fol. 571] IN THE SUPREME COURT, THE STATE OF SOUTH
CAROLINA

SOUTHERN RAILWAY COMPANY, a Corporation organized
and existing under the laws of the State of Virginia,
Respondent,

vs.

ORDER OF RAILWAY CONDUCTORS OF AMERICA, an unincor-
porated Association; Appellant

Appeal from Charleston County. Honorable William
H. Grimball, Judge.

Case No. 3070

Opinion No. 16254

Filed August 15, 1949

Order Staying Execution and Enforcement of Judgment

Order of Railway Conductors of America, the defendant-appellant in the above stated case, having made application for a stay of the execution and enforcement of the judgment against it in the above entitled cause for a reasonable time to enable it to apply for and obtain a writ of certiorari (or appeal) from the Supreme Court of the United States;

It is ordered, That the said defendant-appellant have ninety days after entry on August 15, 1949, of the final declaratory judgment of the Supreme Court of South Carolina within which to apply for a writ of certiorari (or appeal) from the Supreme Court of the United States, and that the execution and enforcement of the judgment herein be stayed until the final disposition of the said petition for certiorari and until the further order of this Court [fol. 572] provided. however, that within twenty (20) days from the date hereof the defendant-appellant shall file a bond in the penal sum of One thousand (\$1000.00) Dollars, with good and sufficient surety, to be approved by the undersigned Chief Justice of this Court, conditioned to the effect that if Order of Railway Conductors of America, the aggrieved party, fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting its application, or fails to make its plea

good in the Supreme Court of the United States, it shall answer for all damages and costs which Southern Railway Company, the plaintiff-respondent, may sustain by reason of the stay.

It is further ordered, that a copy of this order be served without delay on the plaintiff herein or one of its Attorneys of record.

It is further ordered, That the original of this order be filed in the office of the Clerk of the Supreme Court of South Carolina.

D. Gordon Baker, Chief Justice of the Supreme Court of South Carolina.

August 23, 1949.

[fol. 572a] [Endorsed:] The State of South Carolina, In the Supreme Court. Southern Railway Company, a corporation, etc., Respondent, vs. Order of Railway Conductors of America, an unincorporated Association, Appellant. Appeal from Charleston County, Honorable William H. Grimball, Judge. Case No. 3070. Opinion No. 16254. Order Staying Execution and Enforcement of Judgment.

[fol. 573] IN THE SUPREME COURT, THE STATE OF SOUTH CAROLINA

SOUTHERN RAILWAY COMPANY, a corporation organized and existing under the laws of the State of Virginia, Respondent,

vs.

ORDER OF RAILWAY CONDUCTORS OF AMERICA, An unincorporated Association, Appellant

Appeal from Charleston County, Honorable William H. Grimball, Judge.

Case No. 3070

Opinion No. 16254

◦ Filed August 15, 1949

Bond on Stay of Declaratory Judgment Pending Certiorari Or Appeal

Know all men by these presents That we, Order of Railway Conductors of America, an Unincorporated Associa-

tion, as Principal and Fidelity and Deposit Company of Maryland, as Surety are held and firmly bound unto Southern Railway Company a corporation organized and existing under the laws of the State of Virginia, in the full and just sum of One thousand (\$1,000.00) Dollars to be paid to the said Southern Railway Company, its certain Attorneys, Successors or Assigns, to which payment well and truly to be made, we bind ourselves and each of us, our and every of our Successors, jointly and severally firmly by these presents.

Sealed with our Seals and dated the 29th day of August [fol. 574] in the year of our Lord one thousand nine hundred and forty nine.

Whereas, lately by opinion and final decision of the Supreme Court of the State of South Carolina in the above entitled action filed on the 15th day of August, 1949, a final declaratory judgment was rendered in favor of Southern Railway Company against Order of Railway Conductors of America, and the said Order of Railway Conductors of America, upon a Petition for a Stay of the execution and enforcement of said declaratory judgment pending application to the Supreme Court of the United States for a Writ of Certiorari or Appeal, having obtained from the Supreme Court of the State of South Carolina an Order staying the execution and enforcement of said declaratory judgment, as set forth in said Order dated the 23rd day of August, 1949, and filed in the office of the Clerk of the said Supreme Court of the State of South Carolina, predicated upon the filing of a bond in manner and form as hereinabove and hereinbelow set forth;

Now, Therefore, the Condition of the above Obligation is such that if the Defendant-Appellant, Order of Railway Conductors of America, shall answer for all damages and costs which Southern Railway Company, the Plaintiff-Respondent, may sustain by reason of the said Stay if the said Order of Railway Conductors of America, the aggrieved party, fails to make application for such Writ of Certiorari or Appeal within the period allotted therefor, or fails to obtain an order granting its application, or fails to make its plea good in the Supreme Court of the United

States, then the above obligation shall be void and of none effect otherwise to remain in full force and virtue.

Order of Railway Conductors of America, by T. H. Wernitz, Senior Vice President.

Attest G. H. Oram, Gen. Sec. & Treas.

[fol. 575] Signed, Sealed and Delivered in the presence of: (Witness as to Order of Railway Conductors of America), N. P. Statts, J. A. Paddock.

Fidelity and Deposit Company of Maryland, by Gladys H. Carter, as Surety.

(Witnesses as to Surety), Ruth R. Easterling, Dorothy Bell.

The foregoing Bond approved as to form and sufficiency of Surety this 30th day of August, 1949.

D. Gordon Baker, Chief Justice of the Supreme Court of South Carolina.

[fol. 576] IN THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

Case No. 3070

SOUTHERN RAILWAY COMPANY, a Corporation Organized and Existing under the Laws of the State of Virginia, Respondent,

vs.

ORDER OF RAILWAY CONDUCTORS OF AMERICA, an Unincorporated Association, Appellant

Appeal from Charleston County, Honorable William H. Grimball, Judge

ACKNOWLEDGMENT OF SERVICE

We, the Undersigned, hereby acknowledge service of a Certified Copy of Order Staying Execution and Enforcement of Judgment, signed by Honorable D. Gordon Baker, Chief Justice of the State of South Carolina, dated the 23rd

day of August, 1949, upon us at No. 32 Broad Street,
Charleston, S. C. this 25th day of August, 1949.

Barnwell & Whaley, Resident Attorneys for Respond-
ent, Southern Railway Company.

[fol. 577] IN THE SUPREME COURT OF THE STATE OF SOUTH
CAROLINA

SOUTHERN RAILWAY COMPANY, a Corporation Organized and
Existing under the Laws of the State of Virginia,
Respondent,

vs.

ORDER OF RAILWAY CONDUCTORS OF AMERICA, an
Unincorporated Association, Appellant

I, J. B. Westbrook, Clerk of the Supreme Court of South
Carolina, do hereby certify that the foregoing consisting of
five hundred seventy-six pages are true and correct copies of
the record now on file in this office in the above stated case,
consisting of the Transcript of Record; the opinion of the
Court dated August 15, 1945, which opinion is the final judg-
ment of the Court; Petition for Stay of Remittitur to Permit
Application for a Writ of Certiorari or Appeal to the Su-
preme Court of the United States; Order Staying Execution
and Enforcement of Judgment; Bond on Stay of Declara-
tory Judgment Pending Certiorari on Appeal and Ac-
knowledgegment of Service.

J. B. Westbrook, Clerk. (Seal.)

Columbia, South Carolina, September 14, 1949.

[fol. 578] IN THE SUPREME COURT OF THE STATE OF SOUTH
CAROLINA

No. 4279

SOUTHERN RAILWAY COMPANY, a Corporation Organized and
Existing under the Laws of the State of Virginia,
Plaintiff-Respondent,

VS.

ORDER OF RAILWAY CONDUCTORS OF AMERICA, an
Unincorporated Association, Defendant-Appellant

Appeal from Charleston County, Honorable William H.
Grimball, Circuit Judge

PETITION FOR PERMISSION TO ARGUE FOR A REVIEW OF THE
DECISION IN SOUTHERN RAILWAY COMPANY V. ORDER OF
RAILWAY CONDUCTORS OF AMERICA, 210 S. C. 121, 41 S. E.
2ND 774

To the Honorable the Chief Justice and Associate Justices
of the Supreme Court of the State of South Carolina:

The Petition of Appellant, Order of Railway Conductors
of America, respectfully shows:

1. That your Petitioner, pursuant to Section 10 of Rule
8 of the Supreme Court of South Carolina, craves leave in
argument and brief upon the pending appeal to attack or
argue against the decision of this Honorable Court in the
case of Southern Railway Company v. Order of Railway
Conductors of America, the opinion in which was rendered
13th day of February, 1947, and reported in 210 S. C. 121, 41
S. E. 2d 774, with a view to asking the Court to review,
modify or overrule the same, and thereupon assigns as the
[fol. 579] reasons for the filing of this Petition and for ask-
ing the review by the Court of said decision, the following:

2. Your Petitioner respectfully submits that the Court
in retaining in this case jurisdiction paramount to and
superseding that of the National Railroad Adjustment
Board to determine disputes and construe a collective bar-
gaining contract between an interstate carrier by rail and
the duly certified representative of its employees, includ-
ing the determination of technical railroad usages, customs

and accepted practices and interpretations for many years past which were relied upon by both the Carrier and the Railroad Brotherhood as bearing upon or controlling such construction, whether harmonious or repugnant to the actual terms of such contract, has decided a Federal question of substance and construed the Railway Labor Act, 45 U. S. C. Section 151, et seq., in a way probably not in accord with applicable decisions of the Supreme Court of the United States, and particularly the decisions of the United States Supreme Court in *Order of Railway Conductors v. Pitney*, 66 Sup. Ct., 322, 326 U. S. 561; *General Committee, etc. vs. Missouri-Kansas-Texas R. Co.*, 320 U. S. 323; *General Committee, etc. vs. Southern Pacific Company*, 320 U. S. 338; *Switchmen's Union of North America vs. National Mediation Board*, 320 U. S. 297; *Moore vs. Illinois Central Railroad Company*, 321 U. S. 754; *Great Northern Railroad Company vs. Merchants Elevator Company*, 259 U. S. 285; and *Mitchell Coal Co. vs. Pennsylvania R. Co.*, 230 U. S. 247.

3. The question of Procedure, which is also here involved is bound to arise in many other cases and it is of great importance to the Carriers as well as to the Railroad Brotherhoods that it be determined authoritatively whether the procedure for the settlement of such disputes and the construction of collective bargaining agreements should be *administrative* before the National Railroad Adjustment Board, as was the intent of Congress and the purpose of the Railway Labor Act, or whether the procedure [fol. 580] should be *judicial* by means of suits for declaratory judgments before the Courts, State or Federal, of the Forty-eight states, and not both, to the end that parties affected by the uncertainty may be relieved of the necessity of litigating the same case in both the administrative and the judicial forum, as has to be done at present and will continue until the question shall eventually be set at rest by the Supreme Court of the United States.

4. The decision in question was upon a demurrer to the Complaint preparatory to a hearing upon the merits and was in no sense a final judgment which could have supported an application at that time for Certiorari to the Supreme Court of the United States within the terms of the Statute, 28 U. S. C. A. Sec. 344; whereas the present

appeal to this Honorable Court is from a final judgment, the correct decision of which, otherwise than upon the merits, will necessarily be affected by the former decision rendered upon the demurrer so that the said former decision will have to be either followed or modified by this Honorable Court in rendering its decision upon the present appeal.

5. The former decision in question upon demurrer to the complaint was based upon a factual situation alleged in the complaint which had to be taken as true for the purpose of the demurrer, which factual situation was far different from that which was developed by the evidence which formed the basis for the final judgment upon the merits now under appeal, especially in the very material particular that the complaint placed the Ancor Plant in question, together with the switching or other movements incidental thereto, at Pregnall on the main line of railroad, whereas the uncontradicted evidence established that the said Ancor Plant was over six and a quarter miles from Pregnall and the main line, located on a different track, which mistaken premise altered the picture and general impression of the whole case and may well have induced, influenced or affected the former decision rendered upon the demurrer.

[fol. 581] 6. Your Petitioner is advised by its Counsel that in their opinion the grounds upon which the decision in question distinguished and declined to follow the decision of the Supreme Court of the United States in *Order of Railway Conductors of America v. Pitney*, 326 U. S. 561, 66 S. Ct. 322, are such that the Supreme Court of the United States should and probably will grant Certiorari in view of the importance of the question and the confusion which has arisen as to the practice, in addition to the other reasons herein assigned, so that your Petitioner respectfully submits that it is only the right and proper courtesy and deference to this Honorable Court on the part of Petitioner's Counsel that they should submit first to this Honorable Court in brief and argument the grounds and reasons upon which they would argue against the said decision in the Supreme Court of the United States in the event the said questioned decision should be adhered to by this Honorable Court in its final decision upon this appeal, and your Petitioner through its Counsel would desire to feel that it had first exhausted every effort in brief and

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argument to bring all light possible upon this far reaching and important question before this Honorable Court in advance of arguing in opposition to said decision in the Supreme Court of the United States.

7. That the ends of justice would be promoted by a fuller consideration of the important question presented than has hitherto been accorded to it.

Wherefore your Petitioner prays that it may please this Honorable Court to permit your Petitioner in argument and brief to set forth very respectfully but fully and with the authorities relied upon the grounds and reasons upon which your Petitioner urges that the said decision should be reviewed and that this Honorable Court may be pleased to modify the same and make such final decision thereon in this Cause as to the Court shall seem right.

[fol. 582] Very Respectfully Submitted Mitchell & Horlbeck, Elliott, Shuttleworth & Ingersoll, V. C. Shuttleworth, Attorneys for Petitioner.

F. H. Horlbeck, of Counsel.

Charleston, S. C. January 8th, 1949.

[fol. 583] IN THE SUPREME COURT, THE STATE OF SOUTH
CAROLINA

I, J. B. Westbrook, Clerk of the Supreme Court of South Carolina, do hereby certify that the foregoing Petition consisting of five (5) typewritten pages is a true and correct copy of Petition for Permission to Argue for a Review of the Decision in Southern Railway Company v. Order of Railway Conductors of America, 210 S. C. 121, 41 S. E. 2nd 774, filed in this Court on the 8th day of January, 1949, and I further certify that the Permission as prayed in said Petition was granted by the Supreme Court of South Carolina without formal order and attorneys for Petitioner advised thereof by the Clerk of this Court on the 13th day of January, 1949.

Witness my hand and the Seal of said Court at Columbia, South Carolina, this 24th day of September, 1949.

J. B. Westbrook, Clerk. (Seal.)

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1949

No. 438

ORDER ALLOWING CERTIORARI—Filed December 12, 1949

The petition herein for a writ of certiorari to the Supreme Court of the State of South Carolina is granted. The case is transferred to the summary docket and assigned for argument immediately following No. 391, Slocum, as General Chairman, vs. Delaware, Lackawanna and Western Railroad Co.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Douglas took no part in the consideration or decision of this application.

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No. 438

IN THE

Supreme Court of the United States

October Term, 1949

SOUTHERN RAILWAY COMPANY, a corporation organized
and existing under the laws of the State of Virginia,
Respondent

v.

ORDER OF RAILWAY CONDUCTORS OF AMERICA, an un-
incorporated Association,
Petitioner

**PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF SOUTH CAROLINA**

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**PETITION FOR A WRIT OF CERTIORARI TO
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*To the Honorable, the Chief Justice and the Associate Justices
of the Supreme Court of the United States*

The petitioner, Order of Railway Conductors of America,
respectfully prays that a writ of certiorari issue to review the
final judgment of the Supreme Court of South Carolina en-
tered in the above entitled cause on August 15, 1949.

OPINIONS BELOW

The first opinion of the Supreme Court of South Carolina
is reported in 210 S. C. 121, 41 S. E. 2d 774, and is set forth
at R. 31-43. The second opinion is reported in 54 S. E. 2d
816, and is set forth at R. 557-571.

JURISDICTION

The jurisdiction of this court is invoked under Section 1257(3) of Title 28, United States Code.

STATUTES INVOLVED

The pertinent statutes involved are the Railway Labor Act, 45 U.S.C.A., Section 151, *et seq.*, and the Declaratory Judgment Act of the State of South Carolina, Section 660, Code of Laws of South Carolina, 1942, at page 497 of Volume I.

STATEMENT

This case presents the question whether state courts may exercise jurisdiction to determine a dispute of the type over which the National Railroad Adjustment Board has authority under the Railway Labor Act, 45 U.S.C.A., Section 151, *et seq.*, and which was being progressed by petitioner for submission to the Adjustment Board at the time that this suit for declaratory judgment was brought by respondent.

Petitioner is a railway labor union, national in scope, and is the duly accredited bargaining agent and representative of the craft and class of conductors employed by the respondent railroad (R. 1, 5, 513). The respondent is a Virginia corporation operating as a common carrier by railroad in various states including the State of South Carolina (R. 1, 5, 32). The rules, rates of pay and working conditions of conductors employed by respondent are governed by a collective bargaining agreement negotiated between the petitioner and respondent (R. 1, 170; Plaintiff's Exhibit 12 at R. 435). Both petitioner and respondent are subject to the Railway Labor Act (R. 32, 209, 211).

The dispute in controversy arose as follows. On and after

September 7, 1944, certain individual conductors filed time claims against respondent claiming additional pay under Article 5 of their collective bargaining agreement for a 12½ mile "side trip" required of them at Pregnall, South Carolina, an intermediate point on their assigned "straightaway" run between Charleston and Branchville, South Carolina (R. 53-59, 417-425). Respondent paid for the regular "straightaway" trip but declined to pay any additional compensation for the "side trip" (R. 94-95, 112, 126, 427-435). Thereupon, the conductors referred their claims to petitioner as their representative for further handling of the claims in their behalf as provided by the Railway Labor Act (R. 316-317).

Regarding the claims of the individual conductors as valid under the collective agreement, petitioner sought an adjustment with officers of respondent (R. 316-317, 427-435, 843-844). Negotiations were conducted between the parties by correspondence and direct conference in accord with usual and customary practice (R. 56, 128-131, 159-169, 210-211). The dispute related solely to the correct interpretation and application of the collective bargaining agreement (R. 170). Petitioner, in compliance with Section 3(i) of the Railway Labor Act, sought to handle the dispute by conference "up to and including the chief operating officer of the carrier designated to handle such disputes" as a condition precedent to submitting the dispute to the National Railroad Adjustment Board (R. 56, 211, 159-169; 322-324; 426-435; 454).

On April 2, 1945, petitioner through its General Chairman advised the respondent by letter that petitioner intended to submit the claim of Conductor M. K. Lloyd to the Adjustment Board for determination and requested that respondent stipulate that the award of the Board in the Lloyd claim would govern identical claims of other conductors (R. 322-324;

Dfts. Exhibit M at R. 454). No reply was received and negotiations for the settlement of the controversy were still in progress at the time that respondent, on July 12, 1945, commenced this action against petitioner for declaratory judgment in the Court of Common Pleas for Charleston County, South Carolina (R. 211, f. 843-844; 169, f. 675).

The respondent's complaint, brought under the South Carolina Declaratory Judgment Act, Section 660, Code of Laws of South Carolina, 1942, alleged that a controversy existed concerning the rights and obligations of respondent under the collective bargaining agreement entitled "Schedule of Wages, Rules and Regulations of Conductors," effective May 16, 1940; that specifically the controversy consisted of a disagreement between petitioner and respondent as to the proper construction to be placed upon certain provisions of the collective agreement as applied to work to be performed by conductors, and whether the performance of certain services by conductors at Pregnall, South Carolina, might be required of them by respondent without payment of additional compensation (R. 4-14). Respondent prayed for a declaratory judgment or decree "declaring the rights, obligations and other legal relations," of the parties and adjudicating that respondent "is under no legal liability to satisfy said claims or any similar claim which has been made or may be made" (R. 14).

The respondent carrier, claiming that the Adjustment Board procedure is inadequate, made no effort to present the dispute to the Board and instituted this action to obtain a "binding and final" decree designed to deprive petitioner of the procedures of the Railway Labor Act for the settlement, adjustment and determination of the dispute, and to absolve respondent of further compliance with its mandatory duty

of negotiation or compliance with other provisions of the Act (R. 13-14; 524, f. 2094; 527-528).

At every stage of the proceedings petitioner denied the right of the state courts of South Carolina to intervene in and adjudicate a rail labor dispute typical of the kind committed by Congress for determination by the National Railroad Adjustment Board or by other procedures provided in the Railway Labor Act, and which was being progressed under the Act at the time of intervention by the state court.

In its answer to respondent's complaint, petitioner averred that it had been and was handling the claims in dispute in accord with the provisions of the Railway Labor Act; that petitioner was seeking to settle and adjust the claims with respondent by negotiation and collective bargaining as provided in said Act; that petitioner was then seeking to handle the claims in accord with Section 3(i) of the Act "in the usual manner" by negotiation as a condition precedent to filing said claims with the National Railroad Adjustment Board for hearing and determination. Petitioner denied the right of respondent by judicial decree to side-step and by-pass the Railway Labor Act and deny petitioner and the individual conductors represented by it their rights of negotiation and collective bargaining, and their right to submit and obtain a hearing and determination of the dispute by the National Railroad Adjustment Board, or to otherwise proceed under the provisions of the Railway Labor Act (R. 15-25).

After filing its answer, petitioner moved the trial court to dismiss the cause on demurrer on the grounds that the court was without jurisdiction of the subject matter of the action in that it involved a dispute governed by the Railway Labor Act; that Congress, in the exercise of its power over interstate commerce, had provided in the Railway Labor Act the sole

and exclusive procedure for adjustment, settlement and determination of the disputes and controversies of the character alleged in respondent's complaint; that the Railway Labor Act imposed on both parties a mandatory duty of negotiation and that the state court lacked jurisdiction to hear and determine disputes concerning interpretation of collective agreement and thereby to enable respondent to evade its mandatory obligation of collective bargaining. (R. 25-29).

The trial court on April 22, 1946, sustained the demurrer and dismissed the action for lack of jurisdiction of the subject matter and on discretionary grounds (R. 29-31).

Respondent appealed to the Supreme Court of South Carolina from the order of dismissal on demurrer. On February 13, 1947, the Supreme Court of South Carolina reversed the trial court and remanded the cause for trial on the merits (R. 31-43). This decision, not a final judgment, is reported in 210 S. C. 121, 41 S. E. 2d. 774.

In reversing the cause and remanding it for trial on the merits, the Supreme Court of South Carolina construed the Railway Labor Act as providing that (R. 39, f. 155-156):

“* * * Congress intended that controversies of the character set forth in this case may be adjusted in either of two ways: First, under the authority of the Act by submitting the dispute to the National Railroad Adjustment Board; or, second, by exercising the common law rights of any party to bring an action to construe a contract and have his rights declared. There is concurrent jurisdiction of the subject-matter of a suit of this kind, either by a court of competent jurisdiction or by the National Railroad Adjustment Board.”

The South Carolina Supreme Court further held that the action was justified by and fell squarely within the South Caro-

lina Declaratory Judgment Act, Section 660, Code of Laws of South Carolina, 1942 (R. 39).

Prior to trial on the merits, petitioner renewed its objections to maintenance of the action in view of the Railway Labor Act (R. 44). In the course of the trial⁸ the petitioner sought to show the steps being taken by it in progressing the dispute under the Act as bearing on the jurisdiction and judicial discretion of the court to enter a final judgment. The trial court refused to admit the proceedings before the Adjustment Board in evidence (R. 206-208, 415-416; Defendant's Exhibit E at R. 457-509), and expressed its impatience with all evidence relating to the petitioner's efforts to follow the procedures provided in the Railway Labor Act, stating (R. 211):

"We are just rolling empty barrels around here talking about what is in the railroad act. We all admit that the railroad act is here — the railroad is under it; the conductors are under it. All that is true. Why put all that in the record? We are just wasting time."

At the conclusion of the trial on the merits, petitioner again moved the trial court to dismiss the action for lack of jurisdiction of a subject matter governed by the Railway Labor Act, and in the exercise of its discretion, so as to permit the controversy to be determined by the Adjustment Board and by the further procedures provided in the Act (R. 511). The trial court asserted jurisdiction and overruled all grounds urged by petitioner for dismissal of the action (R. 512-528).

In asserting the propriety of judicial intervention the trial court stated in its decree (R. 524):

"Statistics from the annual reports of the National Railroad Adjustment Board to Congress for the year 1944,

1945 and 1946 introduced by plaintiff (respondent) show that that Board has a very large backlog of cases and that it would take several years to secure a decision or award, which would still be subject to a court review entailing a trial de novo. It thus appears that that administrative remedy is *not speedy and adequate*. On the other hand, this court is in a position now to make a *binding and final* declaration that will settle the controversy between plaintiff and defendant." (Emphasis added.)

The trial court entered a final judgment on August 30, 1947, construing the collective agreement in favor of respondent and adjudicating the rights of the parties thereunder as so construed (R. 512-528).

Petitioner appealed from the final judgment of the trial court to the Supreme Court of South Carolina and again renewed its objections and exceptions under the Railway Labor Act (R. 529-535). Petitioner applied for and was granted the right to reargue the jurisdiction of the court to adjudicate a dispute governed by and being processed under the Act (R. 581-584). The issue was extensively argued on appeal. The Supreme Court of South Carolina again denied petitioner's contentions, specifically overruled all of petitioner's exceptions, and adopted and affirmed the final judgment and decree of the trial court (R. 557-559).

QUESTIONS PRESENTED

1. In actions brought by railroad carriers against representatives of their employees, do state courts have jurisdiction to enter declaratory judgments interpreting collective bargaining agreements and declaring the rights of the parties thereunder before such carriers have exhausted the remedies provided by the Railway Labor Act?

2. May state courts intervene in disputes being progressed

under the Railway Labor Act and by-pass and supersede the jurisdiction of the National Railroad Adjustment Board by a binding and final declaratory judgment interpreting a collective bargaining agreement and declaring the rights of the parties thereunder without giving the Adjustment Board the first opportunity to pass on the dispute?

3. May state courts exercise concurrent jurisdiction with the National Railroad Adjustment Board to determine disputes over which the Board has authority?

4. Was the state court's exercise of jurisdiction an abuse of judicial discretion in granting declaratory relief without giving the National Railroad Adjustment Board the first opportunity to pass on the dispute?

5. May state courts terminate collective bargaining in disputes subject to the Railway Labor Act by a binding and final declaration of the rights of the parties in such dispute and in all similar disputes which may arise in the future?

6. Is the South Carolina Declaratory Judgment Act, Section 660 of South Carolina Code of Laws, 1942, as applied, repugnant to the Railway Labor Act?

7. Did the courts of South Carolina deprive petitioner of rights, privileges and immunities under the Railway Labor Act in overruling petitioner's exceptions and objections to maintenance of this action?

REASONS FOR GRANTING THE WRIT

1. The Supreme Court of South Carolina has decided a substantial Federal question of importance in the administration of the Railway Labor Act in a way not in accord with applicable decisions of this court.

2. The decision of the Supreme Court of South Carolina places an erroneous construction on the provisions of the Rail-

way Labor Act in holding that parties subject to the Act have an election of remedies as between its provisions and resort to judicial proceedings and in holding that the Adjustment Board procedure provided in the Act is inadequate.

3. The decision of the Supreme Court of South Carolina is in conflict with the decision of this court in *Order of Railway Conductors vs. Pitney*, 326 U. S. 561, and misconstrues the decision of this court in *Moore vs. Illinois Central Railroad*, 312 U. S. 630.

4. The Supreme Court of South Carolina and other state courts are in conflict with the federal courts as to jurisdiction to adjudicate disputes concerning the interpretation and application of rail collective bargaining agreements subject to the Railway Labor Act.

5. The decision is of national importance. Frequent intervention by state courts in disputes being progressed under the Railway Labor Act will inevitably invite industrial strife and interference with interstate commerce throughout the United States.

ARGUMENT

The impact of this decision and similar decisions in other state courts creates a serious hazard to the proper administration of the Railway Labor Act. At and prior to the time this suit was started petitioner was progressing this dispute in strict adherence to the provisions of the Railway Labor Act. The Act becomes meaningless if its provisions may be nullified and procedure under it terminated at will by invoking declaratory judgment proceedings in the local courts of the forty eight states.

The federal courts have construed the Railway Labor Act as denying jurisdiction to interpret rail collective bargaining

agreements in actions brought to resolve a dispute between a railroad carrier and the representative of its employees, following the decision of this court in *Order of Railway Conductors vs. Pitney*, 326 U. S. 561. Thus, in the following cases the federal courts have denied judicial power to adjudicate such disputes and have held that the Adjustment Board provides the initial and primary remedy.

Order of Railway Conductors vs. Pitney, (1946) 326 U. S. 561

Missouri-Kansas-Texas R. Co. vs. Randolph, 8th Cir. (1947) 164 F. 2d 4

Order of Railway Telegraphers vs. New Orleans, Texas & Mexico Railway Co., 8th Cir. (1946) 156 F. 2d 1

Brotherhood of Railroad Trainmen vs. Texas and Pacific Railway Co., 5th Cir. (1947) 159 F. 2d 822

Illinois Central Railroad Co. vs. Brotherhood of Railroad Trainmen, et al (D. C. Ill., 1949) 83 F. Supp. 930

Atlantic Coast Line Railroad Co. vs. Brotherhood of Railroad Trainmen, et al, decided by the U. S. District Court for the Southern District of Florida on March 30, 1948 (unreported decision set forth in the appendix hereto)

Seaboard Airline Railroad Co. vs. Brotherhood of Railroad Trainmen, et al, decided on March 25, 1949, by the U. S. District Court for the Northern District of Alabama (unreported decision set forth in appendix hereto)

Certain state courts have refused to follow the *Pitney* case and have interpreted the Railway Labor Act as merely providing alternative and concurrent remedies which permit the parties in disputes of this type to elect as between the Rail-

way Labor Act and judicial procedure. The state courts have purported to follow several federal district court cases and the decisions in *Moore vs. Illinois Central Railroad Co.* (1941), 312 U. S. 630, and in the *Washington Terminal Company vs. Boswell (App. D. C.)*, 124 F. 2d 235. Thus, the following state courts have assumed jurisdiction in declaratory judgment actions brought by rail carriers for adjudication of a dispute concerning the interpretation and application of rail collective bargaining agreements.

Southern Railway Company vs. Order of Railway Conductors of America (1947-1949) 210 S. C. 121, 41 S. E. 2d 774; 54 S. E. 2d 816; and see 63 F. Supp. 306

**Delaware, Lackawanna & Western R. Co. vs. Slocum* (N. Y. Court of Appeals, 1949) 87 N. E. 2d 532; and see 56 F. Supp. 634

***Denver, Rio Grande & Western Railroad vs. Brotherhood of Railroad Trainmen, et al*, decided by the State District Court of Denver, Colorado on November 18, 1948 (unreported decision set forth in appendix hereto)

Not only is there a conflict of decision in actions between railroad carriers and employee representatives but there is a lack of harmony concerning the proper interpretation of the Railway Labor Act in suits brought by individual employees. Compare *Adams vs. New York C. & St. L. R. Co.*, 7th Cir., 121 F. 2d 808 and *Evans vs. Louisville & Nashville R. Co.*, 91 Ga. 395, 12 S. E. 2d 611 with *Hampton vs. Thompson*, 5th Cir., 171 F. 2d 535; *United States vs. Missouri-Kansas-Texas R. Co.*, 5th Cir., 171 F. 2d 961; *State vs. Russell* (Mo.), 219 S. W. 2d 340.

*Petition for certiorari in this case has been filed with this court.

**This case is presently on appeal to the Supreme Court of Colorado.

It is submitted that those courts which have sustained jurisdiction to adjudicate a dispute between a rail carrier and the collective bargaining representative of its employees concerning the construction and interpretation of a collective bargaining agreement have misconstrued the Railway Labor Act and have misinterpreted the decisions of this court. This court has found that the Railway Labor Act precludes judicial jurisdiction in disputes between rail carriers and the rail brotherhoods and uniformly has held that, in the first instance at least, the parties must be relegated to the administrative remedies and procedures provided in the Act. *General Committee, etc. vs. Southern Pacific Co.*, 320 U. S. 338; *General Committee, etc. vs. Missouri-Kansas-Texas R. Co.*, 320 U. S. 323; *Switchmen's Union of North America vs. National Mediation Board*, 320 U. S. 297; *Brotherhood of Railroad Trainmen vs. Toledo, P. & W. R. Co.*, 321 U. S. 50; *Order of Railway Conductors vs. Pitney*, 326 U. S. 561.

This court has recognized the propriety of judicial action in railway labor disputes only where an administrative remedy was not available. Thus, a right provided in the Railway Labor Act and otherwise lost if not protected by the courts has been found to warrant judicial intervention. *Virginia Railway Co. vs. System Federation*, 300 U. S. 515. Also, as pointed out by this court in *Steele vs. Louisville & Nashville R. Co.*, 323 U. S. 192, the administrative remedies of the Railway Labor Act may not, in some instances, afford adequate relief to an individual employee, either because the administrative agency cannot give the relief sought in a judicial proceeding or because the individual's claim is opposed by his collective bargaining representative. The individual employee is, therefore, permitted to maintain a judicial action because of the absence of an available administrative remedy under the Rail-

way Labor Act. See: *Moore vs. Illinois Central Railroad*, 312 U. S. 630; *Steele vs. Louisville & Nashville R. Co.*, 323 U. S. 192; *Tunstall vs. Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210; *Elgin, Joliet & Eastern Ry. Co. vs. Burley*, 325 U. S. 711, 327 U. S. 661.

The Supreme Court of South Carolina refused to recognize the construction of the Railway Labor Act by this court and erroneously seized on the decision in *Moore vs. Illinois Central Railroad*, 312 U. S. 630, as confirming a general grant of jurisdiction in the courts to be exercised concurrently with the National Railroad Adjustment Board in determining disputes of this character.

In *Moore vs. Illinois Central Railroad*, *supra*, an individual employee brought an action for damages for wrongful discharge. This suit by an individual employee did not affect the collective rights of the craft or interfere with or by-pass the provisions of the Railway Labor Act. Moore sued in his individual right for damages, accrued and future. *Moore vs. Illinois Central Railroad*, 5th Cir., 136 F. 2d 412. His suit presented a traditional common law action for damages. *Order of Railroad Telegraphers vs. Railway Express Agency*, 321 U. S. 342. The carrier defended on the ground that Moore had failed to exhaust his remedy before the National Railroad Adjustment Board. The Adjustment Board had no power or authority to award the accrued or future damages claimed by Moore. Its only authority was to grant reinstatement with back pay. Also, as this court stated in *Steele vs. Louisville & Nashville R. Co.*, 323 U. S. 192, the remedy of the Adjustment Board is generally not available to an individual employee. This court properly held that the Railway Labor Act did not supersede the right of an individual employee to maintain a common law action for damages. The language used

by this court in the *Moore* case, while applicable to the situation before it, clearly was not intended to be applicable and was not directed toward a suit between a rail carrier and the representative of its employees concerning interpretation of the collective agreement, the subject matter of which directly infringes on the jurisdiction of the Adjustment Board and supersedes the mandatory provisions of the Railway Labor Act as to collective bargaining.

In *Washington Terminal Company vs. Boswell*, 124 F. 2d 235, the carrier's right to bring a declaratory judgment action to review an award of the National Railroad Adjustment Board was denied. By way of dictum the court said that prior to submission of the dispute to the Adjustment Board the carrier had the option to pursue either a judicial remedy or follow its administrative remedy under the Railway Labor Act. This court granted certiorari in 315 U. S. 795. Reargument of specific questions was requested by this court, one of which was:

"Whether either party to a dispute over which the Adjustment Board has authority is precluded from seeking a determination of the dispute by the courts, either before or after submission of the dispute to the Board."

Since the *Boswell* case was affirmed by an equally divided court in 319 U. S. 732, the question was not decided and the decision does not constitute an authoritative precedent. *Hertz vs. Woodman*, 218 U. S. 205.

In *Order of Railway Conductors vs. Pitney*, 326 U. S. 561, this court denied judicial authority for interpretation of rail collective bargaining agreements in actions between rail carriers and employee representatives and held that such controversies should be submitted to the National Railroad Adjustment Board.

The Supreme Court of South Carolina refused to follow the decision of this court in the *Pitney* case and, in ruling on the order sustaining petitioner's demurrer, sought to distinguish it in 210 S. C. 121, 41 S. E. 2d 774, on the ground that the *Pitney* case involved: (1) a jurisdictional dispute between two unions; (2) a suit for injunction rather than for declaratory judgment and (3) was "complicated" by the dual function of the court in bankruptcy and in equity (R. 40).

These distinctions, it is submitted, are utterly without merit. This court has held that the Railway Labor Act provides in the National Mediation Board the exclusive remedy in "jurisdictional" disputes. *Switchmen's Union of North America vs. National Mediation Board*, 320 U. S. 297; *General Committee, etc. vs. Missouri-Kansas-Texas R. Co.*, 320 U. S. 323; *General Committee, etc. vs. Southern Pacific Co.*, 320 U. S. 338. This court also denied judicial power to interpret rail collective bargaining agreements in the *Pitney* case and held that the parties involved in a "jurisdictional" dispute should submit the question of interpretation to the Adjustment Board. But this court has not held, and the Railway Labor Act does not provide, that the remedy of the Adjustment Board is exclusive in "jurisdictional" disputes but nonexclusive and concurrent with judicial processes in other types of disputes. The Supreme Court of South Carolina erroneously concluded that Congress had created in the same Act an exclusive administrative remedy in the National Mediation Board and a non-exclusive administrative remedy in the Adjustment Board. This anomaly is heightened by the decision of the Supreme Court of South Carolina to the effect that the Adjustment Board remedy is exclusive in respect to "jurisdictional" disputes but nonexclusive in other types of disputes.

The suggestion of the Supreme Court of South Carolina

that this court might have reached a different conclusion had the *Pitney* case involved a declaratory judgment action rather than proceedings for an injunction is wholly erroneous. *Macaulay vs. Waterman S. S. Corporation*, 327 U. S. 540, 544, footnote 4.

Finally, the fact that the court in the *Pitney* case exercised the dual function of a court in bankruptcy and a court in equity was a mere circumstance, irrelevant to the principle of whether the Adjustment Board exercises an initial and primary jurisdiction of disputes of this type here involved.

The Supreme Court of South Carolina in the instant case and the New York Court of Appeals in *Delaware, Lackawanna & Western Railroad vs. Slocum*, 87 N. E. 2d 532, emphasized the retention of jurisdiction in the *Pitney* case and erroneously concluded that this court had in fact recognized the concurrent jurisdiction of the Adjustment Board and the courts to interpret rail collective bargaining agreements, and had merely held that a court, in the peculiar circumstances of that case, should exercise equitable discretion to defer its proceedings pending a determination by the National Railroad Adjustment Board. By this interpretation the *Pitney* case is narrowly restricted and the state courts are left free to exercise a jurisdiction in rail labor disputes which is denied to the federal courts.

It is submitted that this conclusion misconstrues the decision in the *Pitney* case. This court, in recognizing the technical nature of such agreements and the specialized character of the National Railroad Adjustment Board, applied the rule which accords primary jurisdiction in the Interstate Commerce Commission for determination of technical fact questions within the specialized province of the Commission. *Great Northern Railway Co. vs. Merchants Elevator Co.*, 259 U. S. 285; *Brown*

Sons Lumber Co. vs. Louisville & N. R. Co., 299 U. S. 393 and *Mitchell Coal Co. vs. Pennsylvania R. Co.*, 230 U. S. 247.

In the *Pitney* case jurisdiction was retained not to interpret the collective agreement there in dispute, but for the purpose only of further judicial proceeding that might be appropriate following a determination by the Adjustment Board. The settled principle was followed that in the application of the primary jurisdiction rule the court has a discretion to retain jurisdiction pending the administrative determination if further judicial proceedings may be appropriate. *Mitchell Coal Co. vs. Pennsylvania R. Co.*, 230 U. S. 247. But if the cause involves matters solely with the primary jurisdiction of a specialized administrative agency and further judicial proceedings are not involved, it is equally settled that the court should order an immediate dismissal. *Armour & Co. vs. Alton R. Co.*, 7 Cir., 111 F. 2d 913, affirmed in 312 U. S. 195. Accordingly, the retention of jurisdiction in the *Pitney* case clearly did not imply an assertion of concurrent judicial jurisdiction over disputes committed to the jurisdiction of the Adjustment Board. It is submitted that the *Pitney* case interprets the Railway Labor Act in a manner binding on the state as well as the federal courts.

The instant case aptly illustrates the compelling necessity for a specialized tribunal for determination of rail labor disputes involving interpretation of collective agreements, and application of the rule of primary jurisdiction to the National Railroad Adjustment Board is particularly appropriate. The trial court attempted to interpret the collective agreement on the basis of voluminous and conflicting testimony as to the meaning of technical terms in the railroad industry such as "straightaway runs," "turnaround runs," "side trips," "lap-backs," "industrial tracks," "turns within turns," "arbitra-

ries," "yard limit boards," and other terms of technical significance in the railroad industry (R. 88, 174-194, 221, 215-220, 228, 247, 249-252, 325-362, 397-398, 409-414). The evidence ranged over a period commencing with World War I (R. 172-183, 412-414).

In addition, while respondent's witnesses conceded that any "side trip" of "100 miles or less" was compensable as an extra minimum day under Article 5 of the collective agreement (R. 221, 133-137), the respondent claimed that the particular 12½ mile "side trip" here involved was part of the "straightaway" run, and not compensable under established usages and practices (R. 8, 79-87, 227-230). The decision of the trial court is interspersed with generalized findings that the 12½ mile round trip off the side of the assigned "straightaway" run, for which claims were filed, is "substantially the same" as, nor "any different from," and is "similar to," or that there is "nothing exceptional about the length of the track," and that it is "of comparable length" with other "industrial tracks" on which conductors have performed "switching" operations "for many years without demanding or being paid extra compensation" (R. 512-528). These generalized conclusions are asserted in the face of a record which contains *not a scintilla of evidence to support them*. This record is *utterly barren of evidence of "comparable" or "similar" practices and the sole evidence was that:*

- (1) The longest side tracks, "industrial" or otherwise, shown to have been regularly "switched" by conductors as a part of a "straightaway" run and regular pay therefore were in fact located at stations *on the assigned "straightaway" run* and were *1800 feet or less in length* — not a round trip of 12½ miles off the side of the "straightaway" run (R. 79-87);
- (2) Not a single side track of a mile or more in length on

the whole 8000 miles of the Southern Railway System was identified *and coupled with any showing whatever* that conductors had regularly travelled it as a part of a "straightaway" run without additional compensation or protest;

(3) No single side track of a length "comparable" (i.e. a mile or more) to the Pregnall side track was shown to have been regularly operated by conductors on a "straightaway" run except where: (a) the respondent had paid an additional minimum day under Article 5 of the collective agreement (R. 220-221, 535, 539, 541, 769, 858-859, 864-865, 882, 1352-1358); or (b) the respondent had bargained for and obtained an agreement with petitioner providing a special rate of pay for the particular side trip (R. 523, 753-757, 940, 946-956, 1014, 1346, 1757); or (c) the particular operation and rate of pay therefore was in dispute (R. 675, 1020-1025).

The alleged "practice" of conductors to make trips "similar" or "comparable" to the 12½ mile side trip involved in this dispute, without additional pay or protest, is utterly non-existent. The findings of established usages and practices are drawn from a complete vacuum. It is imperative that interpretation of rail collective bargaining agreements be handled, as provided in the Railway Labor Act, by an expert tribunal specialized in such disputes.

The petitioner did not request a declaration by the state court and contended that the suit should be dismissed and the disputed question of interpretation left for determination by the National Railroad Adjustment Board. A reversal by this court will accomplish that object.

JURISDICTION FOR REVIEW

This court has jurisdiction to review the whole case including the judgment on the first appeal reported in 210 S. C. 121,

41 S. E. 2d 774. Since it was not a final judgment the petitioner had no right of review at that time. *Bostwick vs. Brinkerhoff*, 106 U. S. 3; *Missouri and Kansas Interurban Railway Co. vs. Olathe*, 222 U. S. 185; *Bruce vs. Tobin*, 245 U. S. 18; *Gorman vs. Washington University*, 316 U. S. 98.

Following the judgment in the first appeal the petitioner continued to urge its objections under the Railway Labor Act and was granted the right to reargue them in the second appeal, reported in 54 S. E. 2d 816 (R. 557-571). The Supreme Court of South Carolina has now entered a final judgment in which it specifically overruled each of the petitioner's exceptions including those based on the Railway Labor Act (R. 557, 559). Review by this court is sought at the first opportunity open to petitioner. It is immaterial that in the second appeal the South Carolina Supreme Court held its first appeal to be "the law of the case." *Urie vs. Thompson*, 69 S. Ct. 1018, 1026; *Gant vs. Oklahoma City*, 289 U. S. 98; *Chesapeake & Ohio Railway Co. vs. McCabe*, 213 U. S. 207; *Grays Harbor Co. vs. Coats-Fordney Co.*, 243 U. S. 251; *Georgia Railway and Power Co. vs. Decatur*, 262 U. S. 432; and see *Western Electrical Supply Co. vs. Abbeville Electric Light & Power Co.*, 197 U. S. 299.

This court has frequently reviewed the action of state courts in attempting to intervene in matters initially within the primary jurisdiction of specialized federal administrative agencies. *Texas & Pacific Railway vs. Abilene Cotton Oil Co.*, 204 U. S. 426; *Great Northern Railway Co. vs. Merchants Elevator Co.*, 259 U. S. 285; *Thompson vs. Texas, Mexican R. Co.*, 328 U. S. 134, 147. In addition, petitioner urged in the state courts and contends here that the South Carolina Declaratory Judgment Act, as applied, is repugnant to the Railway Labor Act. *Bethlehem Steel Co. vs. N. Y. State Labor*

Relations Board, 330 U. S. 767; LaCrosse Telephone Co. vs. Wisconsin Employment Relations Board, 69 S. Ct. 379.

CONCLUSION

Intervention by state courts in the disputes of interstate railroads and their employees nullifies procedures under the Railway Labor Act by cutting short the mandatory negotiations of the parties and by superseding the jurisdiction of specialized administrative agencies. Frequent judicial intervention must inevitably invite economic strife and interruption of interstate commerce. No employee representative could long survive the financial drain of numerous declaratory judgment actions brought by the rail carriers of the United States in the many hundreds of disputes that arise each year. Employees will inevitably resent judgments deemed to be a mutilating construction of the collective agreement. The Railway Labor Act provides a comprehensive procedure for the settlement and determination of disputes of this character prior to court action and represents many years of legislation by Congress for the protection of interstate commerce. Procedures under it should be protected from interference by state courts.

The petition for writ of certiorari should be granted.

Respectfully submitted

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APPENDIX

The following unreported decisions are referred to in the brief:

**"IN THE DISTRICT COURT IN AND FOR THE
CITY AND COUNTY OF DENVER, STATE OF
COLORADO**

Civil Action No. A 54321

Div. 1

THE DENVER AND RIO GRANDE WESTERN RAIL-
ROAD COMPANY,

Plaintiff

vs.

BROTHERHOOD OF RAILROAD TRAINMEN, ORDER
OF RAILWAY CONDUCTORS OF AMERICA,

R. H. McDONALD, as General Chairman of
the General Grievance Committee of Brother-
hood of Railroad Trainmen; and

O. E. SEVIER, as General Chairman of the Gen-
eral Grievance Committee of Order of Railway
Conductors of America

Defendants

FINDINGS
AND
DECREE

This matter coming on to be heard in open court upon the motions filed by the defendants to dismiss, and the court having heard the arguments of counsel; examined all of the citations of all parties; and, being fully informed in the premises,

The Court Finds:

1. That the defendants, having interposed their motions to dismiss, admit all the material allegations contained in the complaint. *Bennetts, Inc., vs. Krogh*, 115 Colo. 18.

2. That this court has jurisdiction of the subject matter of this action. This suit does not involve the validity, construction or effect of any Federal statute, but, on the contrary, and as alleged in the complaint, seeks determination of plaintiff's rights and liabilities under a certain collective bargaining agreement made between the parties at Denver, Colorado, on May 1, 1945, covering rates of pay, rules and working conditions.

The Railway Labor Act of 1926, as amended in 1934, Sec. 3, (i), provides:

"Disputes between an employee . . . and a carrier . . . growing out of . . . the interpretation of agreements concerning rates of pay, rules, or working conditions . . . shall be handled in the usual manner up to and including the chief operating officer of the carrier . . . but, failing to reach an adjustment in this manner, the disputes may be referred by *petition* . . . to the . . . Adjustment Board . . ."

It is significant that the 1926 Railway Labor Act provided that a "dispute *shall* be referred." It is, therefore, manifestly clear that such a change indicated a clarification of the law's original purpose, and that Congress intended that such disputes may be adjusted in either of two ways, First, under authority of the Act by submitting the dispute to the Adjustment Board, or, Second, by exercising the common law right of any of the parties to bring an action to construe a contract and protect his respective rights. Plaintiff chose to bring an action in this court subsequent to its rejection of defendant's demands, and prior to the submission of the dispute to the Adjustment Board. Thus, having made such election to pursue its judicial remedy, and having complied with the Act "up to and including the chief operating officer of the carrier desig-

nated to handle such disputes," this court should retain jurisdiction and carry the matter through to an adjudication.

Therefore, It is ORDERED, ADJUDGED AND DECREED:

That the motions of the defendants to dismiss the complaint be, and the same hereby are, denied.

HAROLD M. WEBSTER

Judge"

* October 14, 1947.

* Judgment on the merits was subsequently entered in favor of the plaintiff railroad and this cause is now on appeal before the Supreme Court of Colorado.

**"UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

**ATLANTIC COAST LINE RAILROAD COM-
PANY, a corporation,**

Plaintiff,

vs.

**BROTHERHOOD OF RAILROAD TRAINMEN,
et al,**

13335 J Civil

Defendants.

**BROTHERHOOD OF LOCOMOTIVE FIRE-
MEN AND ENGINEMEN,**

Intervenor.

ORDER

This cause having been submitted upon the record and supporting affidavits, and the Court having heard the argument of the respective parties, it is upon consideration hereof:

ORDERED AND ADJUDGED:

1. The motion of Brotherhood of Locomotive Firemen and Enginemen (filed March 9, 1948) for leave to intervene, is granted.
2. Plaintiff's prayer for declaratory judgment is denied. The cause is retained on the docket in order to afford the parties an opportunity to apply to the Railway Adjustment Board for an interpretation of the labor contracts involved, after which the Court will consider what, if any, duty rests upon it with respect to the controversy.

DONE AND ORDERED at Jacksonville, Florida, March 30, 1948

[s] LOUIE W. STRUM

U. S. District Judge.

MEMORANDUM

The record presents a typical controversy between a Railway and its employees involving the interpretation of labor contracts regulating working conditions.

Under the Railway Labor Act (45 U.S.C.A. 153, First (i)), and in the circumstances here presented, the interpretation of those contracts is initially a function of the Railway Adjustment Board, not the Courts. *Order of Railway Conductors v. Pitney*, 326 U. S. 591, 90 L. Ed. 318; *Order of Railroad Telegraphers v. New Orleans*, 156 Fed. (2) 1; *MK&T R. Co. v. Randolph*, 164 Fed. (2) 4. The same would be true even though the Brotherhood of Locomotive Firemen and Enginemen had not intervened.

[s] LOUÏE W. STRUM
U. S. District Judge"

"IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE SOUTHERN DIVISION OF
THE NORTHERN DISTRICT OF ALABAMA

SEABOARD AIR LINE RAILROAD COMPANY,
a corporation,

Plaintiff

vs.

BROTHERHOOD OF RAILROAD TRAINMEN,
ET AL,

Defendants

CIVIL ACTION
No. 6093

This cause, coming on to be heard, was submitted upon motion of several named defendants to dismiss the complaint upon the ground inter alia that the complaint presents no justifiable controversy.

The Court has considered the most able oral arguments of counsel but is persuaded that the motion to dismiss must be granted upon the authority of *Brotherhood of Railroad Trainmen vs. Texas and Pacific Ry. Co.*, 159 F. (2d) 822, reaffirmed in *Hampton, et al, v. Thompson, et al*, 171 F. (2d) 535, and *United States ex rel Deavers v. Missouri-Kansas and Texas RR. Co.*, 171 F. (2d) 961.

No point having been made here that this court should stay the proceedings in this suit until plaintiff has been afforded a reasonable opportunity to present the controversies or grievances described in the complaint to the National Railroad Adjustment Board for its interpretation and decision, it is accordingly **ORDERED, ADJUDGED AND DECREED** that this action be and the same is hereby dismissed at the costs of the plaintiff, for which execution may issue.

Done, this the 25th day of March, 1949.

(s) SEYBOURN H. LYNNE

UNITED STATES DISTRICT JUDGE"

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Supreme Court of the United States

October Term, 1949

No. 438

ORDER OF RAILWAY CONDUCTORS OF AMERICA, an un-
incorporated Association,
Petitioner

VS.

SOUTHERN RAILWAY COMPANY, a corporation organized
and existing under the laws of the State of Virginia,
Respondent

ON WRIT OF CERTIORARI TO THE SUPREME
COURT OF THE STATE OF SOUTH CAROLINA

BRIEF FOR THE PETITIONER

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Supreme Court of the United States

October Term, 1949

No. 438

ORDER OF RAILWAY CONDUCTORS OF AMERICA, an un-
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Respondent

ON WRIT OF CERTIORARI TO THE SUPREME
COURT OF THE STATE OF SOUTH CAROLINA

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The first opinion of the Supreme Court of South Carolina is reported in 210 S. C. 121, 41 S. E. 2d 774, and appears at Record 31-43. The second opinion is reported in 215 S. C. 280, 54 S. E. 2d 816 and appears at Record 557-571.

JURISDICTION

The final opinion and judgment of the Supreme Court of South Carolina was entered August 15, 1949. Petition for certiorari was filed on October 29, 1949, and was granted on December 12, 1949. The jurisdiction of this court is in-

voked under Section 1257(3) of Title 28, United States Code.

STATUTES INVOLVED

The pertinent statutes involved are the Railway Labor Act, 45 U.S.C.A., Section 151 *et seq.*, and the Declaratory Judgment Act of the State of South Carolina, Section 660, Code of Laws of South Carolina, 1942, at page 497 of Volume 1.

STATEMENT

The petitioner, a railway labor organization national in scope, challenges the judgment of the Supreme Court of South Carolina holding that in an action for a declaratory judgment brought by the respondent railroad against the petitioner the trial court had concurrent jurisdiction with the National Railroad Adjustment Board to adjudicate a dispute involving the interpretation and application of the collective bargaining agreement between the parties.

Petitioner is the duly accredited bargaining agent and representative of the craft and class of conductors employed by the respondent (R. 1, 5, 513). The respondent is a Virginia corporation operating in interstate commerce as a carrier by railroad in various states, including the State of South Carolina (R. 1, 5, 32). The rules, rates of pay and working conditions of conductors employed by respondent are governed by a collective bargaining agreement negotiated between petitioner and respondent (R. 1, 170; Plaintiff's Exhibit 12, R. 72, 435). Both petitioner and respondent are subject to the Railway Labor Act (R. 32, 209, 211).

Prior to and at the time of the commencement of this

action the petitioner was engaged in negotiations with respondent in an effort to settle and adjust a dispute arising out of the interpretation or application of the collective bargaining agreement between the parties (R. 169, f. 675; 211-212, f. 843-846). The dispute related to the rates of pay applicable to conductors under the collective agreement in respect to operations of the respondent between Pregnall, South Carolina, and the plant of the Ancor Corporation lying about two miles north of Harleyville, South Carolina (R. T-14; 170).

Prior to the commencement of the suit, petitioner had notified respondent on April 2, 1945, of its intention to submit the dispute to the National Railroad Adjustment Board for determination (R. 322-324; Defendant's Exhibit M at R. 454). Petitioner, however, was still attempting to adjust the dispute by conferences and negotiations at the time that respondent commenced this action against petitioner on July 12, 1945, for a declaratory judgment, in which respondent prayed that the Court of Common Pleas for Charleston County, South Carolina, hear, determine and adjudicate the proper interpretation and application of the collective agreement and enter its decree declaring the rights of the parties thereunder (R. 211, f. 843-844; 169, f. 675).

Petitioner contended throughout the proceedings in the court below, and here contends, that the issues presented to the state court for determination were not justiciable for the reason that the suit represented an attempt to have a state court invade a field of interstate commerce pre-empted by Congress in the Railway Labor Act; that petitioner would be deprived of its right of collective bargaining, and its right to avail itself of the further remedies and procedures provided in the Act; and that the subject

matter of the suit directly impinged on the primary jurisdiction of the National Railroad Adjustment Board.

The state court overruled petitioner's contentions and adjudicated the issue of interpretation and application of the collective agreement in favor of the respondent.

Summary of Facts Involved in the Controversy

The extended record is principally devoted to oral and documentary evidence of the meaning of technical railroad terms, and to evidence of practices, customs and usages on which both parties relied in support of their respective contentions concerning the interpretation and application of the bargaining agreement in suit.

In addition, respondent offered evidence from which it was claimed that the inadequacy of the Adjustment Board procedure appeared. The testimony is summarized here to show the exact nature of the issue presented to the state courts for judicial determination.

The dispute in controversy arose as follows: On and after September 7, 1944, certain individual conductors assigned by respondent in local freight service to a 63 mile "straightaway" run between Charleston and Branchville, South Carolina, filed "time claims" against respondent claiming additional pay under their collective bargaining agreement, and particularly Article 5 thereof, for a 12½ mile "side trip" which respondent had required them to make at Pregnall, South Carolina (R. 53-59; 90-100; 417-425). Pregnall is an intermediate point on their assigned "straightaway" run between Charleston and Branchville (R. 59, 62-66).

It is undisputed that the Charleston-Branchville run

was bulletined and assigned as a "straightaway" run to be made each way tri-weekly (R. 59, 449-451, Defendant's Exhibit J and K). At intermittent intervals, however, the respondent required these conductors to interrupt their "straightaway" run at the intermediate point known as Pregnall, leave their train on the main line, cut off the engine, pick up freight cars from the Pregnall siding, and make an unassigned trip on a side track running off Pregnall through the town of Harleyville, South Carolina, (not an intermediate point on the Charleston-Branchville line) and on to the plant of the Ancor Corporation, lying $6\frac{1}{2}$ miles north of Pregnall (R. 7, 59-68, 106-107; Plaintiff's Exhibit 11, R. 434). Respondent ordered this side trip, requiring an average of two hours, for the purpose of delivering or picking up cars of freight at the Ancor plant (R. 106-107, 155). The conductors, after making this $12\frac{1}{2}$ mile two-hour side trip, then continued on their assigned "straightaway" run to its destination. (R. 106-107; 155, f. 620).

The conductors assigned to the Charleston-Branchville "straightaway" run, claiming that the Pregnall side trip had been ordered in violation of the rules of their collective agreement and contrary to their bulletined and assigned "straightaway" run, filed the "time claims" with the respondent claiming, in addition to the compensation for their regular assigned run, compensation for the Pregnall-Ancor plant trip as a new run of "100 miles or less." (R. 90-99; 417-419). The respondent declined to compute the compensation separately for "each" trip of "100 miles or less" as the conductors contended was required by Article 5 of their agreement (R. 426-430), and, on the contrary, totaled the time on the regular Charleston-Branchville run to that spent on the Pregnall-Ancor plant side trip as though the side trip were a part of the assigned "straightaway" run

and paid the conductors on a continuous time basis, or 9.10 plus an average of 24 minutes overtime. (R. 8-9, 155 f. 620, 179-180, 183 f. 732) Since these conductors were entitled to a minimum of \$9.10 for the regular assigned run "100 miles or less," the respondent's method resulted in these conductors receiving an additional average payment of only 68¢ (twenty-four minutes "overtime" at \$1.71 per hour) for the two-hour 12½ mile "side trip" (R. 155, f. 620; 183, f. 732).

Article 5 of the collective agreement provides as follows (R. 72; Plaintiff's Exhibit 12, R. 435):¹

"(a) In all road service, except passenger, 100 miles *or less*, 8 hours *or less* (straightaway *or* turnaround), shall constitute a day's work; miles in excess of 100 will be paid for at the mileage rates provided, except as provided for in Article 28.

"(b) In through freight or mixed train service, a straightaway run is a run *from* one terminal *to* another terminal; and *not less* than one hundred miles will be allowed for *each* such run, except as provided for in Article 28.

The collective agreement further provides that runs be advertised and bulletined so that conductors may bid on them in the order of their seniority (Plaintiff's Exhibit No. 12, Article 26, R. 435).² Plaintiff's witnesses conceded that the bulletin establishes a fixed and regular assignment

¹ Emphasis is supplied throughout this brief unless otherwise indicated.

² The complete text of the collective agreement in suit, Plaintiff's Exhibit No. 12, is not reprinted in the record. This exhibit was filed separately as a part of the transcript of the record in the courts below and was separately certified and filed in this court.

and that trips ordered by the carrier off the "straightaway" assignment entitled the conductor, in addition to his regular trip pay, to the additional minimum pay of "100 miles or less" for "each" added run (R. 133-137, 215, 216-217, 220-221). Mr. Birthright, Superintendent on the Southern Railway, testified for the respondent as follows:

"Q. Mr. Birthright, what is the difference between an assigned man and an unassigned man?

A. An unassigned man and an assigned man? Well, my interpretation is that a man who is assigned is assigned *to a regular job*.

Q. A particular run, isn't that right?

A. *On some particular run, yes, sir.*" (R. 133, f. 531)

• • •

"Q. And when he is required to do anything beyond that job he is entitled under Rule 5(a) to an *additional day*?

A. *That is correct.*" (R. 137, f. 546).

In accord with the foregoing, the respondent did not seriously contend that if unadvertised "side trips" were added to a "straightaway" run such trips were not compensable under Article 5 as an added "basic day" of "100 miles or less." While attempting to limit their testimony to so-called "branch" line "side trips," (and no such distinction as to "branch" lines is to be found in the collective agreement) the respondent's witnesses conceded that any side trip of "100 miles or less" was compensable as an

added "basic day," in addition to the regular assigned trip. Respondent's Assistant Personnel Officer testified under cross-examination, that (R. 221 f. 882):

"In a situation of that kind, where an actual side trip is made over a branch line or a main line *which is not included in a man's assignment*, or in the case of a local freight, in the case of through freight if he isn't notified before leaving the terminal, *it has been customary to allow a man an additional day's pay*. If overtime accrues on the trip *that time consumed in making this so-called side trip is deducted*. He *isn't paid twice for that service*."

In this case respondent claimed that the Pregnall-Ancor Plant movement was not really a "side trip," admittedly compensable at the regular pay for "100 miles or less," but was merely a "switching" operation, and that by practices and usages alleged in its complaint to have existed "since 1910" respondent claimed that "similar" industrial switching movements had been included by inference as a part of the assigned "straightaway" run and regular pay therefor (R. 4-14).

On the trial of the cause, the respondent attempted to support this contention by identifying numerous spur tracks on the Southern Railway on which conductors assigned to a "straightaway" run had regularly switched freight cars to industrial plants or on to house tracks without demanding extra compensation therefor. *All of these spur tracks, however, were in fact located at stations on the assigned run and were 1800 feet or less in length* (R. 80-81, 84-86).

These switching operations of a few hundred feet at stations *located on the assigned "straightaway" run* bear no similarity whatever to the Pregnall 12½ mile "side trip"

off the run (R. 80-81, 84-86). "Switching" operations of the type referred to by respondent did not arise by "practice," are not an exception to the "straightaway" rule, and are specifically covered in the collective agreement under Article 15 which governs switching "*at terminals*" and "*at intermediate points*" (Plaintiff's Exhibit 12, Article 15, R. 435). "Switching," therefore, is performed *at stations* located on the assigned run (R. 80-81, 84-86). There has, in fact, never been any dispute concerning the performance by local freight crews of "switching" *at stations* or "*intermediate points*" located on the assigned run and such crews have always set out or picked up cars on spur switch tracks of not more than a few hundred feet in length which were located at such intermediate points, all as provided by Article 15 of the collective agreement (R. 80-81, 84-86, 384, 394-399).

On the average, such spur switching tracks at stations along a "straightaway" run are of a length of "two or three blocks" or "from 20 to 30 car lengths" (R. 79-86, 246, 397). Such "switching" operations of a few hundred feet, performed *at stations* on the line in accord with the specific provisions of the collective agreement, are in nowise analagous and wholly failed to establish a custom or practice of conductors to make uncompensated "side trips" of more than 6 miles *entirely away from a station on the line* (R. 398).

The respondent failed to identify a single side track of a mile or more in length on the whole 8000 miles of the Southern Railway System and couple it with any showing whatever that conductors had regularly traveled it as a part of an assigned "straightaway" run without additional compensation or protest. In each instance in which the movement had extended beyond the ordinary concept of a mere

"switching" movement of a few hundred feet at a station *on the assigned "straightaway" run*, and had extended several miles *off the "straightaway" run*, the record shows that in the past the respondent had paid an *additional* minimum day under Article 5 of the collective agreement for such trips (R. 134-137, 193, 215, 216-217, 221, 339-340); or that the respondent had *bargained for and obtained an agreement* with petitioner providing a special rate of pay therefor (R. 234-239, 257-258, Plaintiff's Exhibit 16, R. 237-239, Defendant's Exhibit I, R. 448; 239-240, 336-337, Defendant's Exhibit O, R. 455); or that the particular operation and rate of pay therefor *was in dispute* (R. 169, 255-256).

The record is barren of any evidence whatever that conductors had regularly, and as a practice, ran off their assigned "straightaway" run for a mile or more, all without additional compensation or without protest.

In this instance the individual conductors presented their claims for the Pregnall "side trip" directly to officials of the respondent and upon payment being declined referred their claims to petitioner as their representative for the further handling of the claims in their behalf under the provisions of the Railway Labor Act (R. 316-318).

Petitioner, in protection of the claims of these individual conductors and in protection of the agreement as it applied to the craft as a whole, sought to reach an adjustment of the dispute by negotiations with officers of the respondent (R. 316-318, 427-435, 211). Negotiations were conducted between the parties by correspondence and through conference in accord with the usual and customary practice (R. 56, 128-131, 159-169, 210-211). In compliance with Section 3(i) of the Railway Labor Act, petitioner sought to handle the dispute by conference "up to and in-

cluding the chief operating officer of the carrier designated to handle such dispute" as a condition precedent to submitting it, if necessary, to the National Railroad Adjustment Board for determination (R. 56, 211, 159-169, 322-324, 426-435, 454).

On April 2, 1945, petitioner, through its General Chairman, notified the respondent by letter that petitioner intended to submit the claim of Conductor M. K. Lloyd, presenting the issues arising out of this dispute, to the Adjustment Board for determination and requested that respondent stipulate that the award of the Board in the Lloyd claim would govern identical claims of other conductors (R. 322-324; Defendant's Exhibit M at R. 454). No reply was received and negotiations for the settlement of the controversy were still in progress when respondent, on July 12, 1945, commenced this action against petitioner in the Court of Common Pleas for Charleston County, South Carolina, praying for an interpretation of the agreement and a declaratory judgment of nonliability (R. 1-14; 169, f. 675; 211-212, f. 843-846).

Proceedings in the Courts Below

Respondent's complaint, brought under the South Carolina Declaratory Judgment Act, Section 660, Code of Laws of South Carolina, 1942, alleged that a controversy existed concerning the rights and obligations of respondent under the collective bargaining agreement entitled "Schedule of Wages, Rules and Regulations of Conductors," effective May 16, 1940; that specifically the controversy consisted of a disagreement between petitioner and respondent as to the proper construction to be placed upon certain provisions of the collective agreement as applied to the work to be performed by conductors, and whether the perform-

ance of certain services by conductors at Pregnall, South Carolina might be required of them by respondent without payment of additional compensation (R. 4-14).

The respondent prayed for a declaratory judgment adjudicating that the movements to the Ancor Corporation "are a part of the said conductors' service trip under the provisions of the agreement of May 16, 1940, . . . as uniformly interpreted by the parties thereto for many years," and asked that the court enter its judgment "declaring the rights, obligations and other legal relations" of the parties and adjudicate that respondent "is under no legal liability to satisfy said claims or any similar claim which has been made or may be made by defendant" (R. 13-14).

It is undisputed that the controversy presented is one typical of the kind committed by Congress for determination by the National Railroad Adjustment Board. The respondent, however, asserting that the Adjustment Board procedure is inadequate, maintained that it had the *option* of proceeding to the Board or of obtaining a judicial adjudication by some court of competent jurisdiction (R. 13-14; 524, f. 2094; 527-528).

Petitioner removed the action to the United States District Court. The case was remanded on motion by the respondent as not involving a federal question. *Southern Railway Co. vs. Order of Railway Conductors*, 63 F. Supp. 306.

At every stage of the proceedings in the state courts, petitioner denied the right of the courts of South Carolina to interfere with collective bargaining and to assume jurisdiction for adjudication of a railway labor dispute of the kind committed by Congress for determination by the National Railroad Adjustment Board or by the other procedures provided in the Railway Labor Act, which dispute

was being progressed under the Act *at the time of intervention by the state court.*

In its answer to respondent's complaint, petitioner averred that it had been and was handling the claims in dispute in accord with the provisions of the Railway Labor Act; that petitioner was seeking to settle and adjust the claims with respondent by negotiation and collective bargaining as provided in said Act; that petitioner was then seeking to handle the claims in accord with Section 3(i) of the Act "in the usual manner" by negotiation as a condition precedent to filing said claims with the National Railroad Adjustment Board for hearing and determination. Petitioner denied the right of respondent by judicial decree to side-step and by-pass the Railway Labor Act and deny petitioner, as the duly accredited representative of the class and craft of conductors as a whole as well as the individual conductors involved, the rights of negotiation and collective bargaining, and the right to submit and obtain a hearing and determination of the dispute by the National Railroad Adjustment Board, or to otherwise proceed under the provisions of the Railway Labor Act (R. 15-25).

After filing its answer, petitioner, in accord with South Carolina practice, moved the trial court to dismiss the cause on demurrer on the grounds that the court was without jurisdiction of the subject matter of the action in that it involved a dispute governed by the Railway Labor Act; that Congress, in the exercise of its power over interstate commerce, had provided in the Railway Labor Act the sole and exclusive procedure for adjustment, settlement and determination of the disputes and controversies of the character alleged in respondent's complaint; that the Railway Labor Act imposed on both parties a mandatory duty of negotiation and that the state court lacked jurisdiction to

hear and determine disputes concerning interpretation of the collective agreement and thereby to enable respondent to evade its mandatory obligation of collective bargaining (R. 25-29).

The trial court on April 22, 1946, sustained the demurrer and dismissed the action for lack of jurisdiction of the subject matter and on discretionary grounds (R. 29-31).

Respondent appealed to the Supreme Court of South Carolina from the order of dismissal on demurrer. On February 13, 1947, the Supreme Court of South Carolina reversed the trial court and remanded the cause for trial on the merits (R. 31-43). This decision, not a final judgment, is reported in 210 S. C. 121, 41 S. E. 2d 774.

In reversing the cause and remanding it for trial on the merits, the Supreme Court of South Carolina construed the Railway Labor Act as providing that (R. 39, f. 155-156):

“ * * * Congress intended that controversies of the character set forth in this case may be adjusted in either of two ways: First, under the authority of the Act by submitting the dispute to the National Railroad Adjustment Board; or, second, by exercising the common law rights of any party to bring an action to construe a contract and have his rights declared. There is concurrent jurisdiction of the subject-matter of a suit of this kind, either by a court of competent jurisdiction or by the National Railroad Adjustment Board.”

The South Carolina Supreme Court further held that the action was justified by and fell squarely within the South Carolina Declaratory Judgment Act, Section 660, Code of Laws of South Carolina, 1942 (R. 39).

Prior to trial on the merits, petitioner renewed its objections to maintenance of the action in view of the Rail-

way Labor Act (R. 44). In the course of the trial, the petitioner sought to show the steps being taken by it in progressing the dispute under the Act as bearing on the jurisdiction and judicial discretion of the court to enter a final judgment on the merits (R. 211-212). The court sustained the respondent's objections to this evidence and also refused to admit in evidence the Adjustment Board proceedings, filed after commencement of the suit but prior to trial. (R. 206-208, 415-416; Defendant's Exhibit E at R. 457-509). The court expressed its impatience with all evidence relating to the petitioner's efforts to follow the procedures provided in the Railway Labor Act (R. 211):

"We are just rolling empty barrels around here talking about what is in the railroad act. We all admit — that the railroad act is here — the railroad is under it; the conductors are under it. All of that is true. Why put all that in the record? We are just wasting time."

At the conclusion of the trial on the merits, petitioner again moved the trial court to dismiss the action for lack of jurisdiction, or that in the alternative and in the exercise of a proper judicial discretion the action be dismissed, so as to permit the controversy to be determined by the Adjustment Board as provided by the Railway Labor Act or by the further procedures provided in the Act (R. 511).

The trial court asserted jurisdiction and overruled all grounds urged by petitioner for dismissal of the action (R. 512-528).

In asserting the propriety of judicial intervention the trial court stated in its decree (R. 524):

"Statistics from the annual reports of the National Railroad Adjustment Board to Congress for the year

1944, 1945 and 1946 introduced by plaintiff (respondent) show that that Board has a very large backlog of cases and that it would take several years to secure a decision or award, which would still be subject to a court review entailing a trial de novo. It thus appears that that administrative remedy is *not speedy and adequate*. On the other hand, this court is in a position now to make *a binding and final declaration that will settle the controversy* between plaintiff and defendant."

The trial court entered a final judgment on August 30, 1947, construing the collective agreement in favor of respondent and adjudicating the rights of the parties thereunder as so construed (R. 512-528).

Petitioner appealed from the final judgment of the trial court to the Supreme Court of South Carolina and again renewed its objections and exceptions under the Railway Labor Act (R. 529-535). On appeal petitioner applied for and was granted the right to reargue the jurisdiction of the trial court to adjudicate a dispute governed by and being processed under the Railway Labor Act (R. 581-584). The jurisdictional issue was extensively argued on appeal, the petitioner devoting approximately half of a 100 page brief to this question and the respondent filed an extensive brief in reply. The petitioner also challenged the findings of the trial court as wholly without support in the record (R. 536-555).

The Supreme Court of South Carolina in a per curiam opinion overruled all of petitioner's exceptions and adopted and affirmed the final judgment and decree of the trial court (R. 557-559).

This court has granted certiorari for review of the questions presented.

QUESTIONS PRESENTED

1. In actions brought by railroad carriers against representatives of their employees, do state courts have jurisdiction to enter declaratory judgments interpreting collective bargaining agreements and declaring the rights of the parties thereunder before such carriers have exhausted the remedies provided by the Railway Labor Act?

2. May state courts intervene in disputes being progressed under the Railway Labor Act and by-pass and supersede the jurisdiction of the National Railroad Adjustment Board by a binding and final declaratory judgment interpreting a collective bargaining agreement and declaring the rights of the parties thereunder without giving the Adjustment Board the first opportunity to pass on the dispute?

3. May state courts exercise concurrent jurisdiction with the National Railroad Adjustment Board to determine disputes over which the Board has authority?

4. Was the state court's exercise of jurisdiction an abuse of judicial discretion in granting declaratory relief without giving the National Railroad Adjustment Board the first opportunity to pass on the dispute?

5. May state courts terminate collective bargaining in disputes subject to the Railway Labor Act by a binding and final declaration of the rights of the parties in such dispute and in all similar disputes which may arise in the future?

6. Is the South Carolina Declaratory Judgment Act, Section 660 of South Carolina Code of Laws, 1942, as applied, repugnant to the Railway Labor Act?

7. Did the courts of South Carolina deprive petitioner of rights, privileges and immunities under the Railway Labor Act in overruling petitioner's exceptions and objections to maintenance of this action?

SUMMARY OF ARGUMENT

Petitioner's argument may be summarized as follows:

1. The dispute which the respondent railroad submitted to the state courts of South Carolina for adjudication involved the sole question of the proper interpretation or application of a collective bargaining agreement between a railroad carrier engaged in interstate commerce and the collective bargaining representative of the class and craft of conductors employed by this carrier. Congress, in the Railway Labor Act, has legislated a comprehensive and all-inclusive system for the handling of labor disputes in the rail transportation field, expressly stating in the Act that it is designed to provide for the prompt and orderly settlement of "all disputes" arising out of "the interpretation or application of agreements concerning rates of pay, rules or working conditions" (45 U. S. C. A. Section 152). Thus Congress has pre-empted the field of interstate railroad labor relations and state action, statutory or judicial, is precluded.

2. The decision of the Supreme Court of South Carolina, in holding that courts exercise concurrent jurisdiction with the National Railroad Adjustment Board, is in conflict with the decisions of this court, and particularly with the decision of this court in *Order of Railway Conductors vs. Pitney*, 326 U. S. 561.

3. Congress created, in the National Railroad Adjustment Board, a specialized tribunal with primary jurisdiction of disputes involving interpretation and application of rail collective bargaining agreements. This court has recognized the specialized competence of the Adjustment Board and the fact that railroad collective bargaining agreements present technical factual questions and an appreciation of usages and customs in a specialized field for their proper inter-

pretation. In *Order of Railway Conductors vs. Pitney*, 326 U. S. 561, this court applied the rule of primary jurisdiction to the Adjustment Board and reversed the lower courts for their error in assuming jurisdiction to hear and determine a dispute involving interpretation and application of rail collective bargaining agreements. The scope and evident purpose of Congress in enacting the Railway Labor Act and in creating a National Railroad Adjustment Board, composed of members especially competent to hear disputes of the character here involved, conclusively demonstrates the Congressional intent that the Board should have primary jurisdiction over such disputes.

4. The decision of this court in *Moore vs. Illinois Central Railroad*, 312 U. S. 630, is not, as contended by the respondent, controlling on the issue here presented. The *Moore* case involved a suit for damages for wrongful discharge in which an individual employee sought damages accrued and to be accrued in the future. This court, in holding that the individual plaintiff in that case did not need to present his dispute to the National Railroad Adjustment Board as a prerequisite to judicial action, did not have presented to it the question here in issue, and did not hold or decide that courts held concurrent jurisdiction with the Adjustment Board for the adjudication of disputes of the type of which the Adjustment Board is given authority by the Railway Labor Act.

5. The courts of South Carolina were not entitled by a judicial decree to interfere with and nullify the right of this petitioner to avail itself of the remedies and procedures of the Railway Labor Act and to seek to settle and adjust the controversy by the continuing processes of collective bargaining, or by submission of the dispute to the National Railroad Adjustment Board, or by the invocation of the further procedures provided in the Act. The decree below

purports to be a final and binding adjudication and a final settlement of the controversy, not only with respect to the dispute directly involved but in respect to all "similar" disputes which may arise in the future. The effect of the decree is to deprive petitioner of its rights of representation under the Railway Labor Act as to all such disputes. Respondent has obtained a judicial declaration governing the rates of pay, rules and working conditions of the class and craft of conductors on the Southern Railway system, in direct conflict with the provisions of the Railway Labor Act that matters of this kind shall be determined in negotiations between the parties and that disputes between them shall be subject to the procedure provided in the Act. The state courts of South Carolina, as a matter of law, were bound to decline to enter a decree which directly conflicts with the provisions of the Railway Labor Act as to collective bargaining and the further procedures for the settlement and adjustment of disputes as provided in the Act.

6. The Railway Labor Act was intended to embrace all rail labor disputes and provide the exclusive procedures in connection therewith. A consideration of the Act as a whole demonstrates that the Act encompasses the entire field of rail labor disputes and the settlement, adjustment and determination thereof and that any attempt to read into the Act a provision for concurrent jurisdiction of state courts in such disputes is repugnant to and at variance with its provisions.

ARGUMENT

A

Congress Has Pre-empted The Field of Regulation of Labor Disputes on Interstate Railroads

The Railway Labor Act is the product of fifty years of legislation by Congress in the field of regulation of labor relations of interstate railroads. The history of this legislation has been reviewed by the court in a number of decisions involving questions arising under the Act and will not be repeated here. The Congressional aim has been to create a system complete in itself for securing peaceful industrial relations on the railroads so as to prevent the interruption of interstate commerce growing out of economic strife between the carriers and their employees. In enacting the present Act, Congress declared that the legislation was intended (45 U. S. C. A. Section 152(5)):

“to provide for the prompt and orderly settlement of *all* disputes growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions.”

In the first instance, it is mandatory upon the carriers and the representatives of their employees alike to exert every reasonable effort to make and maintain agreements and “to settle all disputes, *whether arising out of the application of such agreements or otherwise* * * *.” (Section 2.) Failing settlement, the Act makes provision for a National Railroad Adjustment Board which is given jurisdiction for determination of disputes growing out of grievances or out of the interpretation or application of agreements, concerning rates of pay, rules or working conditions (Section 3).

Either party may refer a dispute involving interpretation of the collective agreement to the appropriate division of the Adjustment Board, and awards of the Adjustment Board may be enforced by appropriate action of the United States District Court, Section 3 (p). Controversies of the type referable to the Adjustment Board were described by this Court as "minor" disputes in *Elgin, J. & E. Railway Co. vs. Burley*, 325 U. S. 711.

As noted by this court in the *Burley* case, "major" disputes are handled first by the National Mediation Board with further provisions in the Act for arbitration and for hearings before Emergency Boards appointed by the President (Section 4-10).

Under its authority to regulate commerce, Congress has thus legislated in the Railway Labor Act a comprehensive and all-inclusive system for the handling of all labor disputes in the rail transportation field.

Labor relations on interstate rail carriers are as clearly within the constitutional power of Congress over interstate commerce as the transportation itself. This was settled in *Texas & N. O. R. Co. vs. Brotherhood of Railway and S. S. Clerks*, 281 U. S. 548, and the *Virginian Railway Co. vs. System Federation No. 40*, 300 U. S. 515. In the case last cited this court said:

"The power of Congress over interstate commerce extends to such regulations of the relations of rail carriers to their employees as are reasonably calculated to prevent the interruption of interstate commerce by strikes and their attendant disorders. * * * *It was for Congress to make the choice of the means by which its objective of securing the uninterrupted service of interstate railroads was to be secured, and its judgment, supported as it is by our long experience with industrial disputes, and the history of railroad labor rela-*

tions, to which we have referred, is not open to review here."

The Railway Labor Act is rendered impotent if carriers, subject to its provisions, may ignore its expressed policy and avoid the procedures of the Act by the expedient of submitting disputes for the judicial determination of state courts under state declaratory judgment acts.

It is respectfully submitted that the intervention of state courts under state declaratory judgment acts must necessarily constitute an interference with the comprehensive system provided by Congress for the regulation of labor relations on interstate railroads, and that, as applied, the South Carolina Declaratory Judgment Act, Section 660 of the South Carolina Code of Laws 1942, is to this extent repugnant to the Railway Labor Act.

In enacting the Railway Labor Act Congress has made the choice of the means by which its objective of securing uninterrupted service of interstate railroads is to be secured, and the authority of state legislative and judicial bodies was terminated. *Bethlehem Steel Co. vs. New York State Labor Relations Board*, 330 U. S. 767, and *LaCrosse Telephone Co. vs. Wisconsin Employment Relations Board*, 336 U. S. 18.

In the *Bethlehem* case this court said:

"It long has been the rule that exclusion of state action may be implied from the nature of the legislation and the subject matter although express declaration of such result is wanting."

Congress specifically stated in the general purposes expressed in Section 2 of the Act that it was intended "to provide for the *prompt and orderly* settlement of *all* disputes concerning rates of pay, rules, or working condi-

tions; . . . " and "to provide for the *prompt and orderly* settlement of *all* disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." Language more comprehensive could not have been devised and it is obvious that Congress did not intend that the application of the Act should be dependent on and subject to intermittent judicial intervention, at the whim of either party.

We respectfully submit that Congress has occupied the field, and the state courts, purporting to act under the state declaratory judgment acts, or otherwise, are without jurisdiction to intervene and terminate the procedures of the Railway Labor Act.

B

The Decision of the Supreme Court of South Carolina is in Conflict with the Decisions of this Court

This court has consistently held that the Railway Labor Act precludes judicial intervention in the labor controversies of interstate railroads, except in the limited instances in which, *in the absence of administrative remedies*, a denial of jurisdiction in the courts would result in a loss of the rights specifically granted in the Act.

Judicial intervention in rail labor disputes has been strictly defined. Unless a specific authorization be found in the Railway Labor Act, judicial intervention is precluded and the parties must be left to the administrative remedies provided in the Act for the adjustment and settlement of their disputes. *General Committee, etc., vs. Missouri-Kansas-Texas R. Co.*, 320 U. S. 323; *Switchmen's Union vs. National Mediation Board*, 320 U. S. 297; *General Committee, etc., vs. Southern Pacific Co.*, 320 U. S. 338; *Brotherhood of*

Railroad Trainmen vs. Toledo, P. & W. R., 321 U. S. 50; *Steele vs. Louisville & Nashville R. Co.*, 323 U. S. 192; and *Order of Railway Conductors vs. Pitney*, 326 U. S. 561.

In *General Committee, etc. vs. Missouri-Kansas-Texas R. Co.*, 320 U. S. 323, the plaintiff Brotherhood sought a declaratory judgment interpreting the contract between the plaintiff and the carrier defendant, and prayed that an agreement between the carrier and the Brotherhood of Locomotive Firemen and Enginemen be held invalid. In holding the district court without jurisdiction to adjudicate the dispute there involved, in view of the Railway Labor Act, this court specifically held that the Act precluded judicial jurisdiction except in limited instances stating:

“Congress has been highly selective in its use of legal machinery. * * * In view of the pattern of this legislation and its history the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforceable in the courts should be implied. Unless that test is met *the assumption must be that Congress fashioned a remedy available only in other tribunals.*”

The limited instances in which this court has found jurisdiction in courts concerning rail labor disputes are shown by the following cases: *Virginian Railway Co. vs. System Federation No. 40*, 300 U. S. 515 (suit for mandatory order directing the carrier to treat with plaintiff union); *Order of Railroad Telegraphers vs. Railway Express Agency, Inc.*, 321 U. S. 342 (suit to enforce an award of the Adjustment Board brought under Section 3 (p), 45 U. S. C. A., 153 (p), of the Railway Labor Act); *Steele vs. Louisville & Nashville Railroad Company, et al*, 323 U. S. 192 (suit to enjoin defendant carrier and labor organization from exercising discrimination against negro members of

rail craft); *Tunstall vs. Brotherhood of Locomotive Firemen and Enginemen, etc.*, 323 U. S. 210 (same as *Steele case*, supra); *Order of Railway Conductors vs. Swan, et al*, 329 U. S. 520, (suit to remove an administrative stalemate in the Adjustment Board).

Thus, in holding jurisdiction in *Steele vs. Louisville & Nashville Railroad Company, et al*, 323 U. S. 192, this court found that the Railway Labor Act had not excluded petitioner Steele's claims from judicial consideration on the fact that no administrative remedy was available. In the *Steele case* this court said:

"The question here presented is not one of a jurisdictional dispute, determinable under the administrative scheme set up by the Act, cf. *Switchmen's Union v. National Mediation Board*, 320 U. S. 297; *General Committee v. M.-K.-T. R. Co.*, 320 U. S. 323; *General Committee v. Southern Pacific Co.*, 320 U. S. 338; *Brotherhood of Railway & Steamship Clerks v. United Transport Service Employees*, 320 U. S. 715, 816, or restricted by the Act to voluntary settlement by recourse to the traditional implements of mediation, conciliation and arbitration. *General Committee v. M.-K.-T. R. Co.*, supra, 332, 337. There is no question here of who is entitled to represent the craft, or who are members of it, issues which have been relegated for settlement to the Mediation Board, *Switchmen's Union v. National Mediation Board*, supra; *General Committee v. M.-K.-T. R. Co.*, supra. Nor are there differences as to the interpretation of the contract which by the Act are committed to the jurisdiction of the Railroad Adjustment Board."

Differences as to the interpretation of the collective agreement, which this court observed to be absent in the *Steele case*, supra, were presented to this court in *Order of*

Railway Conductors vs. Pitney, 326 U. S. 561. In the *Pitney* case this court specifically denied judicial power to adjudicate a dispute involving interpretation and application of a railway collective bargaining agreement in advance of submission of the dispute for determination by the National Railroad Adjustment Board.

Following the *Pitney* case, decided in 1946, the Federal Courts of Appeal and the District Courts have denied jurisdiction of the courts to adjudicate and determine such disputes and have held that disputes between railroad carriers and rail employee organizations, involving the interpretation of collective agreements, must be submitted to the Adjustment Board for determination as provided in the Railway Labor Act.

Order of Railway Conductors vs. Pitney, (1946) 326 U. S. 561.

Missouri-Kansas-Texas R. Co. vs. Randolph, 8th Cir. (1947) 164 F. 2d 4.

Order of Railroad Telegraphers vs. New Orleans, Texas & Mexico Railway Co., 8th Cir. (1946) 156 F. 2d 1.

Brotherhood of Railroad Trainmen vs. Texas and Pacific Railway Co., 5th Cir. (1947) 159 F. 2d 822.

Illinois Central Railroad Co. vs. Brotherhood of Railroad Trainmen, et al (D. C. Ill., 1949) 83 F. Supp. 930

Atlantic Coast Line Railroad Co. vs. Brotherhood of Railroad Trainmen, et al, decided by the U. S. District Court for the Southern District of Florida on March 30, 1948 (unreported decision set forth in the appendix hereto).

Seaboard Airline Railroad Co. vs. Brotherhood of Railroad Trainmen, et al, decided on March 25, 1949, by the U. S. District Court for the Northern District of Alabama (unreported decision set forth in appendix hereto).

In the case at bar the Supreme Court of South Carolina refused to follow the decision of this court in the *Pitney* case and erroneously interpreted the Railway Labor Act as merely providing a permissive remedy to which the parties might avail themselves at their option, but which was held to be simply an alternative to resort to judicial action. By this line of reasoning the South Carolina Supreme Court held that it had concurrent jurisdiction with the National Railroad Adjustment Board to enter a judicial decree interpreting and applying the terms of a railway collective bargaining agreement.

This decision, it is submitted, is in direct conflict with the express provisions of the Railway Labor Act and with the decisions of this court in interpreting it and construing it. In the *Pitney* case, *supra*, and in the other decisions of this court cited above, this court has expressly held that a party subject to the Railway Labor Act is not permitted to by-pass and evade the provisions of the Act by resorting to judicial action, and that the courts lack jurisdiction to intervene and supersede the administrative remedies and procedures provided in the Act.

The Supreme Court of South Carolina, in reversing the original order sustaining petitioner's demurrer in 210 S. C. 121, 41 S. E. 2d 774, sought to distinguish the case at bar from the decision of this court in the *Pitney* case on the ground that the *Pitney* case involved (1) a jurisdictional dispute between two unions; (2) a suit for injunction rather than declaratory judgment, and (3) was "complicated" by the dual function of the court acting in bankruptcy and in equity. It is respectfully submitted that these distinctions are without merit.

By its reference to "jurisdictional" disputes, the South Carolina Supreme Court apparently reached the conclusion that this court had singled out "jurisdictional" disputes as

not susceptible to judicial intervention and as referable only to the administrative procedures of the Railway Labor Act, but that other types of disputes are susceptible to determination by the concurrent jurisdiction of either the Adjustment Board or the courts.

In the *Pitney* case, *supra*, this court mentioned in passing that the dispute there submitted for judicial determination involved the jurisdictional claims of two unions. The decision of this court in the *Pitney* case, however, placed no emphasis on this fact and is squarely bottomed on the proposition that Congress had created in the Adjustment Board an agency especially competent to deal with the intricate and technical factual questions involved in an interpretation of rail collective bargaining agreements, and that the Adjustment Board should be given the first opportunity for determination of such disputes.

This court has not held, as the Supreme Court of South Carolina apparently concluded, that Congress had created in the Railway Labor Act an exclusive administrative remedy in the National Mediation Board and a nonexclusive administrative remedy in the Adjustment Board. Nor has this court held that the remedy of the Adjustment Board is exclusive with respect to "jurisdictional" disputes, but non-exclusive in other types of disputes.

We submit that the effort of the Supreme Court of South Carolina to distinguish the *Pitney* case on the ground that it involved a "jurisdictional" dispute is without merit.

The further suggestion of the Supreme Court of South Carolina that this court might have reached a different conclusion had the *Pitney* case involved a declaratory judgment action rather than a proceedings for injunction is likewise erroneous. As stated by this court in *Macauley vs. Waterman S. S. Corporation*, 327 U. S. 540, 544, footnote 4:

"The same principles which justified dismissal of the cause insofar as it sought injunction justified denial of the prayer for a declaratory judgment."

Finally, the fact that the court in the *Pitney* case exercised the dual function of a court in bankruptcy and a court in equity was a mere circumstance, irrelevant to the principle of whether courts may exercise concurrent jurisdiction with the National Railroad Adjustment Board, or whether such disputes must be initially submitted to the Adjustment Board for determination.

In the case at bar the Supreme Court of South Carolina attached importance to the fact that this court, in the *Pitney* case, ordered the district court to retain jurisdiction of the cause for any further proceedings warranted *after* the determination by the Adjustment Board of the disputed question of interpretation of the collective agreement there involved. The South Carolina court concluded that this court had, in fact, thus recognized the concurrent jurisdiction of the Adjustment Board and the courts to interpret rail collective bargaining agreements and had merely held that in the peculiar circumstances of that case the court should exercise equitable discretion to defer its proceedings pending a determination by the National Railroad Adjustment Board. By this interpretation the *Pitney* case is narrowly restricted and the state courts would be left free to exercise a jurisdiction in rail labor disputes which is denied to the Federal courts.

This conclusion, it is submitted, misconstrues the decision in the *Pitney* case. In recognizing the technical questions arising out of disputes involving interpretation of rail collective bargaining agreements, this court pointed out that the National Railroad Adjustment Board was a specialized tribunal exceptionally competent and specifically desig-

nated by Congress to deal with such disputes. Accordingly, this court applied to the Adjustment Board the rule which accords primary jurisdiction to the specialized competence of the Interstate Commerce Commission for determination of technical fact questions peculiarly within the specialized province of the Commission, citing, in the *Pitney* case, the previous decisions of this court in *Great Northern Railway Co. vs. Merchants Elevator Co.*, 259 U.S. 285; *Brown & Sons Lumber Co. vs. Louisville & N. R. Co.*, 299 U.S. 393, and *Mitchell Coal and Coke Co. vs. Pennsylvania R. Co.*, 230 U.S. 247.

This court did not order jurisdiction retained in the *Pitney* case for the purpose of interpreting the collective agreements in dispute, but solely for the purpose of any further judicial proceedings that might be appropriate following a determination by the Adjustment Board. The settled principle was followed that in an application of the primary jurisdiction rule the court has discretion to retain jurisdiction pending the administrative proceedings if further judicial action may be appropriate. *Mitchell Coal and Coke Co. vs. Pennsylvania R. Co.*, 230 U.S. 247. On the other hand, if the cause involves matters solely within the primary jurisdiction of a specialized administrative agency and further judicial proceedings are not involved, it is settled that the court should order an immediate dismissal. *Armour & Co. vs. Alton R. Co.*, 7th Cir., 111 F. 2d 913, affirmed in 312 U. S. 195. Accordingly, the retention of jurisdiction in the *Pitney* case did not imply an assertion of concurrent judicial jurisdiction over disputes committed by the Railway Labor Act to the jurisdiction of the Adjustment Board.

C

Congress Created In the National Railroad Adjustment Board A Specialized Tribunal With Primary Jurisdiction of Disputes Involving Interpretation and Application of Rail Collective Bargaining Agreements

The rule is well settled that where Congress, in the exercise of its power over interstate commerce, has enacted a comprehensive statutory system of regulation and has specifically conferred jurisdiction in an administrative agency specialized in the industry, the administrative tribunal has primary jurisdiction over all matters committed to it by the statute.

This rule, while originating in respect to the Interstate Commerce Commission (*Texas & Pacific Railway Co. vs. Abilene Cotton Oil Co.*, 204 U. S. 426), has been held equally applicable to other specialized administrative tribunals including the United States Shipping Board (*United States Navigation Co. vs. Cunard Steamship Co.*, 284 U. S. 474), the National Bituminous Coal Board (*Gray vs. Powell*, 314 U. S. 402; *Stanley v. Peabody Coal Co.*, D. C. Ill., 5 F. Supp. 612), the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act (*United States vs. Ruzicka*, 329 U. S. 287), the National Labor Relations Board (*Fur Workers Union, Local No. 72 vs. Fur Workers Union*, App. D. C., 105 F. 2d 1, affirmed in 308 U. S. 522; *Myers vs. Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *Lund vs. Woodenware Workers Union*, D. C. Minn., 19 F. Supp. 607), and the National Railroad Adjustment Board (*Order of Railway Conductors vs. Pitney*, 326 U. S. 561).

The rule of primary jurisdiction or of prior resort to specialized administrative tribunals created by Congress in the exercise of its supreme power over interstate com-

merce has particular application, as shown by the cases cited above, where the inquiry relates to extrinsic evidence of the meaning of technical terms in the industry, and requires consideration of usages and customs peculiar to the trade.

The decision in the *Pitney* case was squarely bottomed on the ground that Congress, in enacting the Railway Labor Act, had intended to exclude judicial consideration of rail labor disputes except in specifically defined instances and had specifically provided in the Adjustment Board an expert tribunal for determination of disputes of the character here presented, this court stating:

*"But Congress has specifically provided for a tribunal to interpret contracts such as these in order finally to settle a labor dispute * * * Not only has Congress thus designated an agency peculiarly competent to handle the basic question here involved, but as we have indicated in several recent cases in which we had occasion to discuss the history and purpose of the Railway Labor Act, it also intended to leave a minimum responsibility to the courts."*

As to the interpretation of the rail collective agreement in the *Pitney* case, this court said:

"The record shows, however, that interpretation of these contracts involves more than the mere construction of a 'document' in terms of the ordinary meaning of words and their position. See Brown and Sons Lumber Co. v. Louisville & N. R. Co., 299 U. S. 393, 396, 57 S. Ct., 265, 266, 81 L. Ed., 301; Great Northern Ry. Co. v. Merchants Elevator Co., 259 U. S. 285, 291, 42 S. Ct., 477, 479, 66 L. Ed., 943. For O. R. C.'s agreements with the railroad must be read in the light of others between

the railroad and B. R. T. And since all parties seek to support their particular interpretation of these agreements by evidence as to *usage, practice and custom* that too must be taken into account and properly understood. The *factual* question is *intricate and technical*. An agency *especially competent* and *specifically designated* to deal with it has been created by Congress. Under these circumstances the court should exercise equitable discretion to give that agency the first opportunity to pass on the issue. * * * *the court should not have interpreted the contracts for the purposes of finally adjudicating the dispute between the unions and the railroad.*"

As this court indicated in the *Pitney* case, by citation of its leading decision in *Great Northern Railway Co. vs. Merchants Elevator Co.*, 259 U. S. 285, this court was considering the question presented to it in the *Great Northern Railway Co.* case, *supra*, wherein this court said:

"The question argued before us is not whether the *state* courts erred in construing or applying the tariff, but whether *any* court had jurisdiction of the controversy, in view of the fact that the Interstate Commerce Commission had not passed upon the disputed question of construction."

In the *Pitney* case this court, in considering this question, held that the lower courts should not have interpreted the collective bargaining agreements there involved "for the purposes of finally adjudicating the disputes between the unions and the railroad." This holding was, as we have stated, squarely bottomed on the fact that the factual questions involved in interpretation of such agreements are intricate and technical and that Congress has specifically provided an agency in the Adjustment Board especially compe-

tent and specifically designated to deal with such questions. Accordingly, this court held that the Adjustment Board should be given *the first opportunity* to pass on the disputed question of interpretation of the collective agreements involved in that case. This holding was made in spite of the fact that neither party had made any effort at the time of suit to submit their dispute to the Adjustment Board.

In the *Pitney* case this court recognized that Congress, in enacting the Railway Labor Act, was dealing with a highly specialized field. The rules governing pay and working conditions of employees in the rail transportation industry have no similar counterpart in any other industry in the United States. Rail labor agreements are not drawn by attorneys. They are drawn by practical railroad men with a thorough knowledge of railroad operations and in the light of the day to day working conditions of railroad employees. The agreements are terse and couched in terms intended to be understandable to those specialized in a technical industry. Each separate rule has a long history in the industry. Knowledge of long years of custom and practice in the trade is essential to interpretation and application of the rules. Accurate interpretation and application can only be achieved by practical railroad men familiar with rail operations and the precise purpose to be covered by the rule.

With these considerations in mind, Congress created the National Railroad Adjustment Board composed of railroad *representatives of the parties*, expert in rail operation and cognizant of the background and intent of the rules in rail labor agreements. The Board is divided into four divisions and the proceedings of each division are independent of the other. Insofar as practicable, Congress sought to

achieve further specialization within the Divisions of the Board itself. The First Division (composed of ten members, five of whom are selected by the rail carriers of the United States and five by the standard rail labor organizations) specializes in disputes involving only "train and yard-service" employees, these groups generally being referred to as the "operating" crafts. To one familiar with the railroad industry, it is well known that the collective bargaining agreements of the "operating" crafts differ considerably from the agreements negotiated for the various groups of employees known as the "non-operating" crafts whose disputes are heard by the other Divisions of the Adjustment Board.

The Adjustment Board, composed of practical railroad men, was created by Congress to provide a forum to which railroad employees could submit their disputes with the knowledge that a determination would be made by men familiar with the history, background and purposes of the rules involved and fully cognizant of everyday usages and practices in the industry.

The possibility of industrial strife is far less if working men are convinced that their disputes have received a fair and accurate consideration by a board in part composed of their own representatives and expert in the matter under consideration than if they are convinced that decision was not only inaccurate but was made by one wholly unfamiliar and inexperienced in the specific questions presented.

Congress, also being aware that many of the rules contained in the collective agreements of the operating crafts are standard on railroads throughout the United States, was further intent on achieving the uniformity deemed highly desirable in the interpretation and application of these rules by a national board. Thus, at the hearing before

the House Committee on Interstate and Foreign Commerce on H. R. 7650, 73d Cong. 2nd Session at page 47, Mr. Joseph B. Eastman, Federal Coordinator of Transportation stated:

"I also have the feeling that the national board will have a very distinct advantage, because it can establish certain precedents of general application which should furnish a guide for deciding cases locally. As a matter of fact, the same rules are now interpreted in many different ways throughout the country, and that is one reason why grievances which arise remain unsettled, because there is disagreement as to what the same language means and a great variety of interpretations. If we had one board, nation-wide, setting precedents in these matters, I think the tendency would be to establish guides which would enable a great many of the issues to be settled at home."

"Furthermore, I have the feeling that it is very desirable to have a more uniform settlement of these disputes. These matters that we are now dealing with are grievances. They are not the basic rates of pay or the basic working rules and the interpretation of those rules or grievances which men have, and it doesn't seem to me that it is necessary to have any number of different ways of disposing of those all over the country, and that the national board could soon set certain precedents which would discourage and limit the number of such disputes which would arise, because it would be perfectly clear what the outcome would be if they were referred to the national board."

The foregoing considerations of uniformity in the interpretation of rail collective bargaining agreements and the fact that their interpretation and application depends on a knowledge of technical terminology in a specialized industry and a proper appreciation of the history of the rule and practices, usages and customs hereunder, bring

the National Railroad Adjustment Board squarely within the principles underlying the doctrine of primary jurisdiction as developed in the decisions of this court.

If, however, rail collective bargaining agreements are to be subject to interpretation by the courts of the various states there will be no assurance of uniformity even on the property of a single carrier, as the major transcontinental railroad systems of this country traverse a number of states. Furthermore, it may be said, in all due respect, that trial courts are almost without exception wholly unfamiliar with the complex considerations essential to a proper interpretation and application of a rail collective bargaining agreement.

The instant case aptly illustrates the compelling necessity for a specialized tribunal for determination of disputes involving interpretation and application of such agreements. The trial court attempted to interpret the collective agreement on the basis of voluminous and conflicting testimony as to the meaning of technical terms in the railroad industry such as "straightaway runs," "turn-around runs," "side trips," "lapbacks," "industrial tracks," "turns within turns," "arbitraries," "yard limit boards," and other terms of technical significance in the railroad industry (R. 88, 174-194, 221, 215-220, 228, 247, 249-252, 325-362, 397-398, 409-414). The evidence ranged over a period involving orders and directives issued by the Director-General of railroads in World War I and over the subsequent period of more than a quarter century (R. 172-183, 412-414).

In addition, while respondent's witnesses conceded that each "side trip," or any other trip off of or contrary to the regular "straightaway" assignment, is compensable as an *additional* minimum day of "100 miles or less" under Article 5 of the collective agreement (R. 221, 133-137), the re-

spondent claimed that under established practice and custom, the particular 12½ mile "side trip" here involved was merely a "switching" operation *and a part of* the "straight-away" run, to be compensated on the straight time basis applicable only in figuring overtime, if any, accumulated while *on* (and not *off*) the regular "straightaway" run (Compare: R. 8-9 f. 31-33 with R. 221 f. 882-883 and R. 336 f. 1541).

In attempting to make findings on the evidence as to usage and custom the trial court interspersed its opinion and judgment with generalized findings that the 12½ mile round trip off the side of the assigned "straightaway" run, for which claims were filed, is "substantially the same" as, nor "any different from," and is "similar to," or that there is "nothing exceptional about the length of the track," and that it is "of comparable length" with other "industrial tracks" on which conductors have performed "switching" operations "for many years without demanding or being paid extra compensation" (R. 512-528). These generalized conclusions are asserted in the face of a record which is *barren of evidence of "comparable" or "similar" practices and the sole evidence was that:*

1. The longest side tracks, "industrial" or otherwise, shown to have been regularly "switched" by conductors as a part of a "straightaway" run and regular pay therefor were in fact located *at stations on the assigned "straight-away" run and were 1800 feet or less in length* — not a round trip of 12½ miles off the side of the "straightaway" run (R. 79-87);

2. Not a single side track of a mile or more in length on the whole 8000 miles of the Southern Railway System was identified *and coupled with any showing whatever* that conductors had regularly traveled it as a part of a

"straightaway" run *without the additional compensation* provided by Article 5(a) or by special agreement — or it was shown that if such trips had been required without additional pay the matter was then in dispute (see references to record at page 10 of this brief).

We have summarized the facts as disclosed by the record in the case at bar for the purpose of demonstrating the intricate and technical factual issues which confronted a court unfamiliar with technical railroad terms and lacking the experience essential to evaluation of customs and usages as applied to rail collective bargaining agreements in a specialized industry. The record as a whole reaffirms the prior pronouncements of this court that rail labor controversies are complicated, involve technical factual issues of usage and custom, and require specialized knowledge and a background of practical experience on the part of the board or tribunal which is to determine them.

It is not without significance that Congress, in creating the National Railroad Adjustment Board provided in Section 3(p) of the Act that the United States District Courts should have jurisdiction, in disputes over which the Board has authority, only for enforcement of its awards.

Thus, Congress specifically indicated its intent that disputes such as this should be presented to the specialized competence of the Adjustment Board *in the first instance* and should thereafter be presented to a court *only in the event* that the carrier refused to comply with an order of the Board and it became necessary to obtain a judicial order of enforcement.

It is true that the United States District Court is not compelled to enter an enforcement order on a patently erroneous award, but it is also true that in considering the award it is required to accept the findings and order of the

Board as "prima facie evidence of the facts therein stated." The United States District Court, therefore, at the outset of its proceedings has the benefit of a specialized determination by an expert tribunal.

In this case, petitioner has been deprived of its right to obtain an authoritative determination by the Adjustment Board in the first instance and then, if necessary, present the matter to a Federal District Court with the knowledge that the court will treat the findings and order of the Board as prima facie evidence of the facts therein stated. Furthermore, the petitioner has been compelled to undergo a long and expensive litigation, which, if repeated as to all of the minor disputes presented by conductors whom it represents on the carriers throughout the United States, would of necessity be very costly, whereas Section 3(p) of the Railway Labor Act provides that in the enforcement suits therein provided petitioner would not be liable, except in certain specific circumstances, for costs at any stage of the proceedings or on appeal, and that if petitioner prevailed a reasonable allowance for attorney fees would be taxed and collected as part of such costs.

We contend that it is apparent from the provisions of the Act that Congress intended that controversies of the character here presented should not be left at the option of either the carrier or the representative of the craft to judicial determination in the first instance. In *Elgin, Joliet & Eastern Railway Co. vs. Burley*, 327 U. S. 661, in referring to the Adjustment Board, this court said:

" . . . The Board is acquainted with established procedures, customs and usages in the railway labor world. It is a specialized agency selected to adjust these controversies."

The presumption may not be indulged that Congress intended to permit such lack of uniformity as would result if rail labor disputes such as this are left for unrestrained judicial determination.

If the contention of respondent be correct, it is not unreasonable to foresee conflicting court decisions in the several states. To each trial court in each such controversy there would be offered and tried anew all of the voluminous and conflicting testimony of the meaning of the technical terms, usages and customs, and the historical background involved in these rules, many of which have their origin under the administration of the railroads by the Director-General of Railroads more than a quarter of a century ago and which are standard rules on the various carriers in the United States. If the contention of the respondent in this case shall prevail, the major objects and purposes which Congress had in mind and declared in the Act will be jeopardized, if not destroyed.

We submit that Congress created the National Railroad Adjustment Board and gave it primary jurisdiction for the very purpose of promoting uniformity of interpretation of the rules and provisions contained in railroad collective bargaining agreements, and with the purpose of creating a specialized tribunal familiar with the technical terms used in such agreements, cognizant of the history and background of the rules, and familiar with the usages and practices followed thereunder in practical railroad operation.

Moore vs. Illinois Central Railroad,
312 U. S. 630, Does Not Control
The Case At Bar

The respondent, in the courts below and in the brief filed by it in opposition to the petition for certiorari, has relied almost entirely on the decision of this court in *Moore vs. Illinois Central Railroad*, 312 U. S. 630.

In its brief in opposition to the petition for certiorari the respondent broadly urged that this court, in the *Moore* case, held that parties subject to the Railway Labor Act are not "compelled" to present their claims to the Adjustment Board but have the choice of resorting to a court of competent jurisdiction in the first instance; and that the *Moore* case decides that parties subject to the Railway Labor Act need not seek adjustment of their controversies, as provided in the Act, as a prerequisite of the bringing of an action in a state court.

We submit that the contention that the *Moore* case has decided the issue presented here is erroneous.

In *Moore vs. Illinois Central Railroad, supra*, Moore had been employed as a switchman for the Alabama and Vicksburg Railroad Company in its yards at Jackson, Mississippi. On February 15, 1933, Moore, having been absent from work for a year on sick leave, reported for work and was discharged as "an unsatisfactory employee." He was given a hearing before the superintendent of the railroad in which his slowness and irregularity of working, and the fact that in the previous year he had instituted a suit against the company claiming a violation of his seniority rights, were brought up by the railroad as reasons for his

discharge. *Illinois Central Railroad vs. Moore*, 5th Cir., 112 F. 2d 959.

On September 16, 1936, Moore sued the Illinois Central Railroad Company, which had taken over the operation of the Alabama and Vicksburg Railroad, in a court of Mississippi for damages for his discharge. Moore alleged in his complaint that he was a member of the Brotherhood of Railroad Trainmen, which had an agreement in force with the railroad; that the agreement provided that no person should be discharged "without just cause," and that he had been discharged "arbitrarily and without just cause."

Subsequently Moore amended his complaint to claim damages in the sum of \$12,000.00 and the defendant railroad removed the case to the United States District Court.

As appears from the opinion in *Moore vs. Illinois Central Railroad Co.*, 5th Cir., 136 F. 2d 412, Moore sought damages "accrued and to accrue in the future," growing out of the alleged breach of contract asserted by him. The Court of Appeals for the Fifth Circuit pointed out that Moore was entitled to bring one suit for all damages accrued and to accrue in the future, and held that his complaint alleged a cause of action for accrued and future damages rather than for damages due and unpaid as of the date of suit, stating (136 F. 2d 412):

"The demand was for a judgment in the sum of \$12,000. The declaration did not allege that Moore would have earned \$12,000 within the period from February 15, 1933, (the date of discharge) to September 16, 1936 (the date of suit); indeed, if he had worked every day during that period at the rate of pay alleged, he would have earned less than \$9,000. The trial court treated the suit as one to recover all damages sustained by reason of the breach, and stated: 'The rule of damages is that the plaintiff is entitled to recover all damages

that he suffered as a proximate result of the breach of the contract, less any amount that he may have earned for himself'."

Moore did not seek reinstatement with back pay or any other relief which might have been afforded him by submission of his dispute to the National Railroad Adjustment Board. The Adjustment Board had no power to award Moore a judgment for damages, accrued and to accrue in the future. Nevertheless, in answer to his suit the Illinois Central Railroad Company, among other defenses, pleaded that Moore had failed to exhaust his remedies under the Railway Labor Act by submitting his claim for wrongful discharge to the National Railroad Adjustment Board, and for this reason the suit should be abated. This plea was stricken on demurrer by the trial court. On appeal, the Court of Appeals for the Fifth Circuit likewise held it to be an invalid defense on the ground that Adjustment Board remedy (of reinstatement with back pay) did not exclude direct recourse to the courts by Moore for damages for wrongful discharge, accrued and to accrue in the future. The Fifth Circuit, in *Illinois Central Railroad Co. vs. Moore*, 112 F. 2d 959, 966, further stated:

"In case of an arbitrary discharge the union might take the matter to the management, the Adjustment Board, or even to the test of a strike. The *individual* also on his *individual* contract of employment may seek reinstatement with pay through the railroad's officers, or through the Adjustment Board; or he may, before or after pursuing these remedies, *acquiesce in the discharge and ask damages* for a breach of contract in a court of law."

At the time of the submission of the *Moore* case to this

court, in 312 U. S. 630, the railroad still contended that Moore's suit had been prematurely brought because of his failure to exhaust the administrative remedies granted him by the Railway Labor Act. This contention was urged to this court in the face of the fact that, as noted by the Fifth Circuit in the opinion quoted above, the Adjustment Board could at most only have awarded Moore reinstatement and back pay, and could not have awarded him damages accrued and to accrue in the future. Accordingly this court held that the Railway Labor Act did not take away from the courts jurisdiction to determine a suit brought by an individual employee for damages for wrongful discharge.

This court has characterized the *Moore* case as presenting a traditional "common law action for wages." *Order of Railroad Telegraphers vs. Railway Express Agency*, 321 U. S. 342. Clearly the Railway Labor Act in no way superseded the right of an individual employee to prosecute his individual common law action for damages for wrongful discharge. The controversy was one solely between Moore and his former employer, the Illinois Central Railroad.

The situation presented by the *Moore* case is not comparable to that in the case at bar. In the *Moore* case the craft representative was not a party to the litigation; the matter was not being processed either by Moore or by his craft through the procedures provided for by the Act; there was no attempt to procure a judgment to forever terminate further procedures under the Railway Labor Act; and no attempt was being made, as here, to procure a judgment that would be "final and binding" as to all similarly situated. The relief sought by Moore in the exercise of his individual right was not in direct conflict with the provisions and procedures provided in the Railway Labor Act.

In the case at bar petitioner was following the pro-

cedures of the Railway Labor Act up to the very instant of suit. The effect of the decree, and, presumably, the object of the suit was to terminate further procedures under the Railway Labor Act. The trial court stated that the decree would be a "final and binding" adjudication which "will finally settle the controversy." More explicit language could not have been used to indicate the design of the trial court to supersede and terminate any further procedures under the Railway Labor Act for the adjustment, settlement and determination of the dispute existing between petitioner and respondent.

The *Moore* case was decided shortly before the decision in *Washington Terminal Co. vs. Boswell*, App. D. C., 124 F. 2d 235, in which the carrier's right to bring a declaratory judgment action to review an award of the National Railroad Adjustment Board was denied. However, by way of dictum, the court in the *Boswell* case, apparently relying on the decision of this court in *Moore vs. Illinois Central Railroad*, *supra*, commented that prior to submission of a dispute to the Adjustment Board the carrier had the option of pursuing either a judicial remedy or of following its administrative remedy under the Railway Labor Act.

Certiorari was granted by this court in the *Boswell* case and in the course of submission this court directed that certain questions be argued, one of the specific questions being:

"Whether either party to a dispute over which the Adjustment Board has authority is precluded from seeking determination of the dispute by the courts, either before or after submission of the dispute to the Board."

The fact that argument was requested on this question would indicate that this court was not of the opinion that

the question had theretofore been determined by the decision in the *Moore* case. Also, this court carefully limited its question for argument to disputes within the statutory jurisdiction of the Board, which clearly excluded the issue in the *Moore* case as to whether Moore should be awarded accrued and future damages. In any event, the *Boswell* case was affirmed by an equally divided court in 319 U. S. 732. The question presented on reargument was not decided in this case, and the decision does not constitute an authoritative precedent. *Hertz vs. Woodman*, 218 U. S. 205.

The courts below refused to recognize the clear distinction drawn by this court between suits brought by an *individual* employee, as distinguished from suits in which railroad carriers and the organizations representing their employees are opposing parties, and one party or the other is attempting to avoid or interfere with the procedures provided in the Railway Labor Act.

As heretofore noted, this court has uniformly denied judicial jurisdiction in suits between the rail carriers and the railway labor organizations, and has held that in the first instance the parties must be relegated to the administrative remedies and procedures provided in the Act. This court has recognized the propriety of judicial action in rail labor disputes only where an administrative remedy is not available.

As pointed out by this court in *Steele vs. Louisville & N. R. Co.*, 323 U. S. 192, the administrative remedies of the Railway Labor Act may not, in some instances, afford relief to an *individual* employee, either because the administrative agency cannot give the relief sought in a judicial proceeding, or because the individual's claim is opposed by his collective bargaining representative. Accordingly, this court has held that an *individual* employee may, at least in

some circumstances, be permitted to maintain a judicial action because of the absence of an administrative remedy available to him under the Railway Labor Act. See: *Moore vs. Illinois Central Railroad*, 312 U. S. 630; *Steele vs. Louisville & N. R. Co.*, 323 U. S. 192; *Tunstall vs. Brotherhood of Locomotive Firemen and Enginemen*, 323 U. S. 210; *Elgin, Joliet & Eastern Railway Co. vs. Burley*, 325 U. S. 711, 327 U. S. 661.

It is respectfully submitted that this court has drawn a clear distinction between suits brought by an *individual* employee to which the administrative remedies of the Railway Labor Act may not be available or without power to grant the relief sought, and suits involving the rail carriers and representatives of their employees where the effect of the suit will be to by-pass the administrative remedies of the Railway Labor Act and interfere with the procedures which Congress provided in the Act for the settlement, adjustment and determination of the specific matter in controversy.

It is of no consequence, as has been emphasized by the respondent, that the *Moore* case referred to the fact that there is no legal compulsion on parties subject to the Railway Labor Act to submit their disputes to the Adjustment Board. In the case at bar the respondent seeks by a judicial decree to relieve itself of its mandatory legal compulsion under the Railway Labor Act to exert "every reasonable effort" to negotiate a settlement of the dispute here presented, and seeks further to prevent petitioner from obtaining an authoritative determination of the dispute by the National Railroad Adjustment Board, or avail itself of the further procedures provided in the Act.

The statement of this court in *Moore vs. Illinois Central Railroad*, *supra*, that the machinery provided in the Railway Labor Act for the settlement of disputes was not

"based on a philosophy of legal compulsion" in no sense supports the respondent's contention that this court intended to interpret the Railway Labor Act as permitting state courts to assume jurisdiction in such disputes. This court had no difficulty in finding a lack of judicial jurisdiction to determine matters as to which the Railway Labor Act provided for settlement by recourse to the *voluntary* implements of mediation, conciliation and arbitration. *General Committee, etc. vs. M.-K.-T. R. Co.*, 320 U. S. 323, 332, 337; *Brotherhood of Railroad Trainmen vs. Toledo, Peoria & Western Railroad Co.*, 321 U. S. 50. And, in sustaining judicial intervention in *Steele vs. Louisville & Nashville R. Co.*, 323 U. S. 192, this court specifically pointed out, as a *ground of jurisdiction*, that the plaintiff in that case did not have available to him the *voluntary* remedies of the Railway Labor Act, saying (page 205):

"The question here presented is not one * *restricted by the Act to voluntary settlement* by recourse to the traditional implements of mediation, conciliation and arbitration. *General Committee v. M.-K.-T. R. Co.*, *supra*, 332, 337."

Likewise, in *Mitchell Coal & Coke Co. vs. Pennsylvania R. Co.*, 230 U. S. 247, the Interstate Commerce Act before the court in that case, by its specific terms, granted the plaintiff the *option* of the alternative remedies of a suit in court or an administrative proceeding before the Interstate Commerce Commission. As observed by this court in *United States Navigation Co. vs. Cunard Steamship Co.*, 284 U. S. 474, this court held that matters committed to the Interstate Commerce Commission were within the exclusive primary jurisdiction of the Commission, and this holding was made:

“ * * * in the face of a clause in Section 22 of the Interstate Commerce Act, that nothing therein contained should in any way abridge or alter existing common law or statutory remedies, but that the provisions of the act were in addition to such remedies.”

The decisions of this court cited above conclusively demonstrate, we believe, the fact that the plaintiff's argument, based, as it is, on a lack of “legal compulsion” to be found in the Railway Labor Act, is entirely irrelevant to the issue here under consideration. In determining whether Congress had vested an exclusive primary jurisdiction in a specialized administrative tribunal, this court has not heretofore sought to determine whether the statute contained language of legal compulsion. On the contrary, as this court clearly stated in *United States Navigation Company vs. Cunard Steamship Company, supra*, the controlling factor was whether it appeared from the scope and evident purpose of the Act that Congress intended to confer an exclusive primary jurisdiction in an administrative body especially trained and experienced in the intricate and technical facts and usages of the matters to be submitted to it.

It is respectfully submitted that the scope and evident purpose of the Railway Labor Act is clearly demonstrative of the conclusion that Congress intended that disputes of the nature here involved should be submitted, at least in the first instance, to the National Railroad Adjustment Board for hearing and determination. The Adjustment Board is but one of the procedures provided by Congress in the Railway Labor Act for the adjustment and settlement of labor controversies. Clearly, there is no merit in the respondent's contention that Congress intended to permit courts to intervene and absorb the jurisdiction of the Adjustment Board,

but at the same time intended to preclude judicial intervention as to the jurisdiction of the Mediation Board.

We respectfully submit that the decision of this court in *Moore vs. Illinois Central Railroad, supra*, lends no aid to the respondent's contention that state courts may assume jurisdiction to adjudicate controversies of the character here submitted.

E

The Final Decree Of The State Court Is In Direct Conflict With the Mandatory Provisions Of The Railway Labor Act As To Collective Bargaining

At the time of the commencement of this action and up to and including the date of trial thereof, the dispute between the petitioner and respondent concerning interpretation and application of the collective agreement was still pending (R. 169). Various conductors of the craft were still filing claims for additional pay for the Pregnall-Ancor Plant movement and such claims were filed both before and after commencement of the suit (R. 195). Respondent admitted that the dispute arising out of these claims was still in the process of negotiation (R. 211).

The trial court, in commenting on the fact that the controversy was still pending at the time of trial, remarked to respondent's counsel (R. 169):

“Mr. Barnwell, the controversy is *what we are trying to settle here now*, isn't it?”

The trial court in its final decree further stated that (R. 515):

“ * * * this court is in a position now to make a *binding and final* declaration that will settle the controversy between plaintiff and defendant.”

In its final decree the trial court ordered and declared that the movements on the private track serving the plant of the Ancor Corporation be held to be “industrial switching” and that such movements “constitute a part of the service trips of the conductors of the local trains between Charleston and Branchville”; that conductors are not entitled “to an additional day’s pay or any other additional compensation” apart from the pay for their regular service trip from Charleston to Branchville; that respondent has fully paid these local freight conductors for their services in the operations at Pregnall; and that the respondent is under no legal liability to satisfy “the claims or any similar claims which have been made or may be made by defendant (petitioner) for extra compensation for conductors of local freight trains for performing industrial switching on tracks serving the Ancor Corporation at Pregnall, South Carolina” (R. 527-528).

This court has held that collective bargaining under the Railway Labor Act is not only a mandatory but a continuous process. The final decree of the trial court chopped short and exonerated the respondent from any further duty “to exert every reasonable effort” to settle this and all “similar” disputes which may arise in the future (Section 2(1), First of the Railway Labor Act). *Virginia Railway Co. vs. System Federation*, 300 U. S. 515, 545, 553-554.

In this case petitioner has been advised by a “final and binding” judicial decree that the dispute has been finally settled *by the court* and that further efforts on the part of the petitioner to perform its statutory function to obtain a settlement of the dispute by negotiation must be aban-

done not only in respect to this dispute but in respect to all "similar" disputes that may arise in the future. The decree could not have more effectively cut off collective bargaining as to such disputes and in respect to the craft as a whole had it contained an injunctive order.

It is no answer to say, as respondent does in its brief in opposition to the petition for certiorari, that the trial court found that "The claims were appealed by the defendant (petitioner) to the highest officer of the plaintiff authorized to handle such claims and were formally rejected" (R. 515).

The petitioner was not bound to desist from further efforts to settle the dispute by negotiation merely by reason of the fact that negotiations had been carried to "the highest operating officer" of the carrier from whom a "formal" rejection had emanated. As stated above, this court has recognized collective bargaining as a continuing process. Petitioner may well have had reason to believe that further conferences and negotiations with the highest operating officer of the carrier might ultimately lead to an amicable adjustment and settlement of the controversy in spite of the initial rejection, and that as suggested by petitioner, Article 5 of the collective agreement might be amended in regard to this operation so as to provide a special rate of ~~compensation~~ for the Pregnall movement (R. 318, 234-239, 257-258, 336-337). Petitioner, therefor, was entitled to continue its negotiations for adjustment of the controversy.

Certainly the respondent did not relieve itself of its further and continuing duty of collective bargaining merely by forwarding to petitioner a formal declination of payment of these claims from its "highest operating officer." Nor does the fact that the dispute had reached the highest

operating officer, and payment of the claims had been declined, confer jurisdiction on the state court for *settlement* of the controversy.

We desire to call the attention of the court to the fact that this petitioner, in responding to the complaint of the respondent in this cause, did not at any time join in the respondent's request that the court enter a declaratory judgment on the merits of the case, and at all times throughout the proceedings in the courts below asserted its position that the cause should be dismissed and the dispute be settled, adjusted, or determined through the remedies and procedures provided in the Railway Labor Act.

It is respectfully submitted that the decree in the case at bar directly interfered with collective bargaining under the Railway Labor Act and must be reversed on this ground alone. It is further submitted that Congress did not intend or contemplate that after disputes had reached "the highest operating officer" that parties subject to the Railway Labor Act would immediately thereafter be permitted to engage in a race as between submission of the dispute to a court or to the Adjustment Board, or that either party could obtain a judicial decree which would relieve it of its mandatory duty of collective bargaining under the Act.

F

*The Railway Labor Act Was Intended To Embrace All
Rail Labor Disputes And Provide The Exclusive
Procedures In Connection Therewith*

In the various decisions of this court the history of rail labor legislation, culminating in the Railway Labor

Act and the procedures therein provided for, have been referred to extensively.³

The present Act represents a long experience in rail labor disputes. The Act and the machinery and procedures therein provided for have played a substantial part in preventing interruption of interstate commerce by the use of economic force on a national or regional basis.

The petitioner contends that Congress, in the adoption of the Act, intended to and did embrace within the provisions of the Act the entire field of rail labor disputes and created specialized boards, methods and procedures to be followed in the handling and the progression of such disputes.

The five major objects and general purposes of the Act are set forth in Section 2 (1) of the Act. These general purposes are all-inclusive. The objects are to avoid interruption to commerce; to forbid any limitation upon freedom of association; to provide for the complete independence of self-organization; to provide for the prompt and orderly settlement of all disputes "concerning rates of pay, rules or working conditions;" and "to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of

³ See, also: Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 1946 Yale Law Journal 567; Spencer, *The National Railroad Adjustment Board*; Fisher, *Industrial Disputes and Federal Legislation*; Johnson, *Government Regulation of Transportation*; Wolf, *Railroad Labor Board*; Alderman, *The History of Federal Legislation*; *Hearings Before The Committee On Interstate Commerce*, United States Senate On S. 3266; *Hearings Before The Committee On Interstate and Foreign Commerce*, House of Representatives on H. R. 7650; *Inquiry Of The Attorney General's Committee On Administrative Procedure Relating To The National Railroad Adjustment Board.*

agreements covering rates of pay, rules, or working conditions."

The further provisions of Section 2 of the Act impose the affirmative duty upon carriers and employees alike to exert every effort to make and maintain agreements as well as to settle all disputes, "whether arising out of the application of such agreements or otherwise." It directs that all disputes shall be considered by the carrier and the designated representatives of the employees; makes provision for the rights of individual employees, craft representation, and by Section 2, Sixth, requires that it shall be the duty of the designated representatives of both the carrier and the employees, to meet within ten days after notice to confer with respect to any dispute "arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions, * * *."

Prohibitions are provided against changing rates of pay, rules or working conditions except in the manner prescribed in the Act, and the Act further prescribes the method, means and the agency for the determination of the representatives of the crafts of employees involved.

Section 3 of the Act creates the National Railroad Adjustment Board, the manner and method of the selection of the members thereof by the carriers and the representatives of the labor organizations, and provides that the compensation of the members thus selected shall be paid by the party such member is to represent. This Section prescribes the jurisdiction of the four divisions of the Adjustment Board thus created. Paragraph (i) of Section 3 of the Act provides:

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of

grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, *shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes*, but, failing to reach an adjustment *in this manner*, the disputes may be referred by petition of the parties or by *either* party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

The procedures provided in the Act as a whole impose a duty of meeting, bargaining and negotiating in an attempt to adjust grievances or disputes growing out of the interpretation or application of agreements "in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes, * * *." This is a mandatory duty upon carrier and representatives of employees alike. Having thus progressed the matter from its inception with the local officials through, to and including the chief operating officer of the carrier, the Act further provides that "failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties" to the Adjustment Board.

It is true that there is no legal compulsion upon either the carrier or the representative of the employees to present the matter to the Adjustment Board. The duty is affirmative and mandatory, however, to meet, confer and attempt to adjust the dispute through the chief operating officer of the carrier. Neither party may by-pass the duty of meeting and negotiating before proceeding to the Adjustment Board. Nor is it contemplated that, before exhausting these duties of holding conferences and bargain-

ing, either party may seek to bring about a determination of the dispute through the exercise of economic force, court action or invoke the services of any other agency otherwise provided for in the Act.

The clear provisions of the Act contemplate that if the dispute is not settled by meeting and negotiating, up to and including the chief operating officer of the carrier designated to handle such disputes, that either party may then submit the matter to the appropriate division of the Adjustment Board, if the dispute is one properly to be determined by it.

By the provisions of Section 3 of the Act, Congress not only created a specialized board or agency peculiarly competent to handle the questions, but prescribed the method and manner thereof in a *practical* and *economical* way. The submission to the Adjustment Board may be made by either party with a full statement of the facts and all supporting data. Days, weeks or perhaps months of oral testimony are not envisioned by this procedure. Rather, merely a full statement of facts to the specialized board and agency, is all that is necessary or required.

By the provisions of Section 3 (m), the awards of the Board are to be in writing and furnished to each party, and such awards are expressly made

“final and binding upon both parties to the dispute, except insofar as they shall contain a money award.”

Not only did Congress create the specialized board and provide for the method and manner of the submission of the dispute in a practical, economic and efficient way, not imposing upon either party the necessity or requirement of extended hearings and testimony, technical rules of evidence, practice and procedure and the expense of counsel

necessarily required in court matters, but in addition it prescribed a method and means of judicial enforcement of the awards made by the Board.

Section 3(p) of the Act confers jurisdiction upon any District Court of the United States, in any District in which the carrier resides or maintains an office or through which it operates, for the enforcement of an award. In such a proceeding it is further expressly provided:

“ * * * the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, * * * ”

thus recognizing the weight and effect to be given to the award of the specialized administrative agency created for the purpose of hearing and determining such disputes in the first instance. The further provisions of this Section, providing that the petitioner seeking to enforce the award shall not be liable for costs and that if a petitioner shall prevail that a reasonable attorney fee shall be allowed and taxed, may not be ignored. These procedures were designed and created by Congress as a method and means of accomplishing the major objects and purposes of the Act. They belie any thought or suggestion that it was intended by Congress that disputes of the character to be heard and determined by the Adjustment Board should, at the *whim* of either the carrier or the employees or their representatives, be relegated to the ordinary judicial processes in the state or federal courts.

The further provisions of Section 3 prescribing a uniform period of limitation within which actions based on awards may be instituted, and imposing upon the Mediation Board the duty of making annual reports showing “in detail all cases heard, all action taken,” and other data of the

Adjustment Board support the all-inclusive nature of this Act.

The provisions of Section 3, granting the Adjustment Board power and authority to establish regional adjustment boards, and the provision providing that an individual carrier, system or group of carriers or any class or classes of its employees shall not, by any provision of the Act, be prevented from *mutually* agreeing to the establishment of regional boards of adjustment, all highlight and emphasize the intent of Congress in accord with petitioner's contentions made herein.

The provisions of the Act creating the National Mediation Board, its functions and duties, and providing that either the carrier or employees may invoke the services of the Board with respect to disputes as therein expressly provided, and "~~any other dispute not referable to the National Railroad Adjustment Board~~ * * *," further demonstrate the all-inclusive scope of the Act.

Provisions are further made for arbitration in Section 7 of the Act, the method of selecting the arbitrators, the handling of their duties, the production of books and records, the filing of the award in the appropriate office of the Clerk of the District Court or Circuit Court of Appeals of United States, and the jurisdiction of the courts with respect to such arbitration board awards further bear out the intent of Congress to set up, by the provisions of the Act as a whole, all machinery, agencies and boards to include all disputes in rail labor matters. It is significant that, with respect to the provisions for arbitration, it is provided:

"That the failure or refusal of either party to submit ~~a controversy to arbitration~~ shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise."

There is no provision of the Act providing that either party may by-pass its provisions and invoke the jurisdiction of state courts, as was done in the case at bar. Respondent's attempt to read into the Act such a provision by judicial interpretation is repugnant to its every provision and its stated objects and purposes.

Section 10 of the Act further provides that:

"If a dispute between a carrier and its employees be not adjusted *under the foregoing provisions of this Act* and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce * * *"

an emergency board may be appointed by the President and for the further procedure of such a board, and for a stay for a period of thirty days following the report of the board of any change in the existing status and working conditions, unless made by agreement by the parties to the controversy.

A more comprehensive and all-inclusive Act to achieve the objects and purposes sought can hardly be imagined. The whole field of rail labor disputes in the original making and negotiating of agreements and in the settlement of disputes arising therefrom are encompassed and provided for.

The finding of the trial court that the Adjustment Board procedure provided in the Railway Labor Act "is not speedy and adequate," has no support either as a conclusion of law or as a finding of fact. Certainly the trial court had no authority to determine the claimed inadequacy of the Adjustment Board procedure as a matter of law, and its finding of lack of speed on the part of the Board, based on the oral testimony of respondent's witnesses that a decision of the Board could not be obtained for several years, does

not establish that the Board is less speedy than the judicial processes of courts. In any event, delay in an administrative remedy would not warrant judicial relief. *Utah Fuel Co. vs. National Bituminous Coal Commission*, App. D. C., 101 F. 2d 426. —

We respectfully submit that the asserted "inadequacy" of the Adjustment Board remedy would not constitute a valid ground in law for the conclusion of the courts below that, as a matter of judicial discretion, this dispute might be adjudicated on its merits.

We further submit that on whatever ground the decree of the courts below is based it inevitably conflicts with the Railway Labor Act and deprives this petitioner of its rights, privileges and immunities thereunder, and for these reasons must be held in law as beyond the authority of a state court.

The issues presented to this court are important not only to the parties here involved but to all rail labor disputes between all interstate carriers and their employees throughout the United States. In the First Division of the Adjustment Board alone, involving only the operating crafts, more than 1,000 disputes are decided each year (see annual reports of the National Mediation Board). The determination of a comparable number of lawsuits instituted annually in the different states could result in chaos in the interpretation of collective agreements, impose tremendous financial burdens upon the parties and encourage and invite the use of economic force as the only remaining practical method of handling such disputes.

We respectfully submit that in considering and in determining the issues presented in the case at bar the Railway Labor Act must be considered as a whole. When this is done the conclusion must result that controversies of the character here involved must follow the procedures provided by the Act; that Congress has pre-empted the field and that

the South Carolina Declaratory Judgment Act, as here interpreted and applied, is in conflict with the Railway Labor Act; that the state courts of South Carolina were without jurisdiction; that the Adjustment Board must be given the first opportunity to hear and determine disputes such as this; that the decree directly interferes with and cuts off collective bargaining; and that the judgment of the courts below should and ought to be adjudged void, of no force and effect, and be vacated and set aside.

CONCLUSION

It is respectfully submitted that for each and all the reasons herein urged, the final judgment rendered by the Supreme Court of South Carolina deprives petitioner of rights, privileges and immunities under the Railway Labor Act, particularly its right of collective bargaining concerning this and similar disputes which may arise in the future, its right to have this and similar disputes determined by the National Railroad Adjustment Board and its right to avail itself of the further procedures provided in the Railway Labor Act. It is further submitted that the Declaratory Judgment Act of South Carolina, as interpreted and applied, is to this extent repugnant to the Railway Labor Act and that the judgment below is of no effect and is void.

Under the Railway Labor Act petitioner is entitled to immunity from suits of the character here involved and is entitled to have controversies such as this adjusted, settled and determined by the process and procedures provided by

Congress in the Act. A reversal of the decree below will accomplish this object.

Respectfully submitted,

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APPENDIX

The following unreported decisions are referred to in the brief:

“UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA JACKSONVILLE DIVISION

ATLANTIC COAST LINE RAILROAD COM-
PANY, a corporation,

Plaintiff,

vs.

BROTHERHOOD OF RAILROAD TRAINMEN,
et al,

#13335 J Civil

Defendants.

BROTHERHOOD OF LOCOMOTIVE FIRE-
MEN AND ENGINEMEN,

Intervenor.

O R D E R

This cause having been submitted upon the record and supporting affidavits, and the Court having heard the argument of the respective parties, it is upon consideration hereof:

ORDERED AND ADJUDGED:-

1. The motion of Brotherhood of Locomotive Firemen and Enginemen (filed March 9, 1948) for leave to intervene, is granted.
2. Plaintiff's prayer for declaratory judgment is denied. The cause is retained on the docket in order to afford the parties an opportunity to apply to the Railway Adjustment Board for an interpretation of the labor contracts in-

involved, after which the Court will consider what, if any, duty rests upon it with respect to the controversy.

DONE AND ORDERED at Jacksonville, Florida,
March 30, 1948

[s] LOUIE W. STRUM
U. S. District Judge.

MEMORANDUM

The record presents a typical controversy between a Railway and its employees involving the interpretation of labor contracts regulating working conditions.

Under the Railway Labor Act, 45 U.S.C.A. 153, First (i), and in the circumstances here presented, the interpretation of those contracts is initially a function of the Railway Adjustment Board, not the Courts. *Order of Railway Conductors v. Pitney*, 326 U. S. 591, 90 L. Ed. 318; *Order of Railroad Telegraphers v. New Orleans*, 156 Fed. (2) 1; *MK&T R. Co. v. Randolph*, 164 Fed. (2) 4. The same would be true even though the Brotherhood of Locomotive Firemen and Enginemen had not intervened.

[s] LOUIE W. STRUM
U. S. District Judge"

"IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA

SEABOARD AIR LINE RAILROAD COMPANY,
a corporation,

Plaintiff

VS.

BROTHERHOOD OF RAILROAD TRAINMEN,
ET AL,

Defendants

CIVIL ACTION
No. 6093

This cause, coming on to be heard, was submitted upon motion of several named defendants to dismiss the complaint upon the ground inter alia that the complaint presents no justifiable controversy.

The Court has considered the most able oral arguments of counsel but is persuaded that the motion to dismiss must be granted upon the authority of *Brotherhood of Railroad Trainmen vs. Texas and Pacific Ry. Co.*, 159 F. (2d) 822, reaffirmed in *Hampton, et al, v. Thompson, et al*, 171 F. (2d) 535, and *United States ex rel Deavers v. Missouri-Kansas and Texas RR. Co.*, 171 F. (2d) 961.

No point having been made here that this court should stay the proceedings in this suit until plaintiff has been afforded a reasonable opportunity to present the controversies or grievances described in the complaint to the National Railroad Adjustment Board for its interpretation and decision, it is accordingly ORDERED, ADJUDGED AND DECREED that this action be and the same is hereby dismissed at the costs of the plaintiff, for which execution may issue.

Done, this the 25th day of March, 1949.

(s) SEYBOURN H. LYNNE

UNITED STATES DISTRICT JUDGE

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FILED

FEB 8 1950

CHARLES ELMORE CROPLEY

CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 438.

ORDER OF RAILWAY CONDUCTORS OF AMERICA,
an unincorporated Association, *Petitioner*

SOUTHERN RAILWAY COMPANY, a corporation organized and
existing under the laws of the State of Virginia,
Respondent

On Writ of Certiorari to the Supreme Court of the State
of South Carolina.

REPLY BRIEF FOR THE PETITIONER.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1949.

No. 438.

ORDER OF RAILWAY CONDUCTORS OF AMERICA,
an unincorporated Association, *Petitioner*

v.

SOUTHERN RAILWAY COMPANY, a corporation organized and
existing under the laws of the State of Virginia,
Respondent

On Writ of Certiorari to the Supreme Court of the State
of South Carolina.

REPLY BRIEF FOR THE PETITIONER.

Respondent concedes that even as a condition precedent to invoking the jurisdiction of a state court, it would be necessary for that court first to determine that the dispute has been "handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes" and that every reasonable effort had been made by the parties to settle the dispute by negoti-

ation (Sec. 3(i) and Sec. 2 First of the Railway Labor Act).

Accordingly, respondent asserts at page 4 of its brief, as a basis for state court jurisdiction, that the claim "had been appealed to the highest officer of the carrier and had been formally rejected" and then concludes, based upon this assertion, that "nothing remained to be done, at the time this suit was filed, to enable the parties to submit the dispute to the courts or to the National Railroad Adjustment Board, as they, or either of them, might elect."

The only "formal" rejection that appears in this record in regard to the numerous claims filed by the various individual conductors (Plaintiff's Exhibits Nos. 1, *et seq.* shown at R. 417-419) is the letter of December 19, 1944, written by a Mr. Cox, one of the members of the staff of Mr. C. D. Mackay, Assistant Vice President in Charge of Labor Relations, to petitioner's general chairman, declining payment of the first two "time claims" filed by Conductor Lloyd for September 7 and 9, 1944. (R. 162-163; Plaintiff's Exhibit No. 1 at R. 417-418)

That Mr. Cox himself did not regard this so-called "formal rejection" as the end of negotiations, even in regard to the Lloyd claim, is shown by the fact that *negotiations thereafter continued concerning this identical claim as well as for settlement of the entire dispute.*¹ (R. 163-168) Mr. Cox wrote to General Chairman Lawrence on March 23, 1945, inviting a further statement of the organization's position (R. 164-166). On March 30, 1945, Mr. Cox again wrote to General Chairman Lawrence in which he made reference to a conference on March 28, 1945 concerning the Lloyd claim (R. 167). In his letter of March 30, 1945, Mr. Cox stated that further efforts would be made toward settlement of the dispute, saying: (R. 167)

"You (General Chairman Lawrence) stated at the beginning of the discussion that you had appealed

¹ Emphasis ours unless otherwise indicated.

certain other similar claims to General Manager Adams and that he had not, up to the present time, replied to your letter. Under these circumstances, as these claims were not then before me, we did not discuss them in detail. We did, however, discuss the matter in a general way and agreed to look into the matter further with the view of seeing whether or not a settlement can be reached."

Mr. Cox also testified that further conferences were held and said that he did not know whether his letter to General Chairman Lawrence of March 30, 1945, (Plaintiff's Exhibit 10 at R. 166-168; 433) was the final letter written on this matter, stating on direct examination (R. 166):

"Q. I hand you Plaintiff's Exhibit 10 (the letter of March 30, 1945) and ask you if that is the final letter written in the matter.

"A. I can't say, Colonel, it was the final letter written in connection with this matter; because some more claims were appealed, as I recall it, *and subsequent conferences were held.*"

Petitioner's General Chairman was not only engaged in processing each "time claim" through the various officers on the Southern Railway, but was also attempting to obtain a settlement of the entire controversy (R. 167, 318, 400-401). Various individual conductors were filing "time claims" up to and including the date of commencement of this suit on July 12, 1945 (R. 418-419). Obeying the mandate of the Railway Labor Act and in accord with the terms of the collective agreement, General Chairman Lawrence continued to handle each "time claim" with the various officers of the carrier both before and after commencement of suit (R. 321-324). Provision for "time claims" is made in Article 30 of the collective agreement (Plaintiff's Exhibit 12 at page 63), and prompt handling of each claim was necessary in order to prevent its bar under the 60-day limitation of Article 32 of the agreement (Plaintiff's Exhibit No. 12 at page 64).

Conferences and discussions were continuing both before and after suit was instituted (R. 211, 400). There was no "formal" rejection of the "time claims" of the other individual conductors. Nevertheless, the decree of the trial court included all such claims, whether or not the claims had been processed to the highest operating officer, as well as all "future claims" (R. 527-528).

Respondent would apparently leave it to the state court to determine as a fact whether the parties in good faith had exercised every reasonable effort to adjust the controversy and whether each claim in controversy had been processed through negotiation to the highest operating officer, and had been "formally" rejected, before the court would entertain jurisdiction of the subject matter.

In each case of this kind, a fact issue would therefore be presented as to whether the parties had exhausted their mandatory obligation of collective bargaining. If state court jurisdiction is merely dependent upon a "formal" rejection, the carrier would always be in a position to win the race as between the adjustment board and the court. It would need only to deposit a formal rejection in the mails and immediately thereafter institute suit in the forum of its choice. A situation more fraught with possibilities of industrial strife can scarcely be imagined.

I

In Division I of its brief respondent argues that this Court, in *Moore v. Illinois Central R. Co.*, 312 U. S. 630, held that The Railway Labor Act does not exclude ordinary judicial jurisdiction for the "enforcement" of rail collective bargaining agreements.

We have discussed the *Moore* case at length in our main brief. At pages 11 to 13 of its brief, respondent argues that unless it be held that courts have concurrent jurisdiction with the adjustment Board a discrimination will exist as between a railroad employer and its employees.

This is indeed a surprising argument in view of the decision of this Court, in *Order of Railway Conductors v. Pitney*, 326 U. S. 561, which *denied* the right of a rail bargaining agent to seek judicial enforcement of its agreement with a railroad carrier prior to the submission of the dispute concerning its interpretation to the National Railroad Adjustment Board. Certainly this Court did not intend to deny the right of judicial relief to the bargaining representative, yet leave it subject to similar suits by the carriers.

Respondent's argument proceeds on an erroneous premise. Respondent makes the statement that this Court, in *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U. S. 711, 327 U. S. 661, held that the collective bargaining agent could act in the handling of claims under the contract "only to the extent authorized by the individual employees involved." This statement is immaterial in the present case. No one here questioned the petitioner's right to seek adjustment of the claims involved from respondent. Petitioner was seeking to recover and not compromise or relinquish the money "time claims", and for the craft as a whole was also trying to negotiate a settlement of the entire controversy out of which "time claims" arose. Its interest in such disputes was specifically noted in the *Burley* case.

After stating the ruling of this Court in the *Burley* case respondent arrives at the amazing conclusion that:

"It necessarily follows that petitioner as a representative of conductor employees is in no different position with respect to the election of remedies than was the individual employee involved in the Moore case."

This conclusion is a *non sequitur*. It wholly ignores the decisions of this Court in which the difference has been pointedly stated. Remedies under the Railway Labor Act which may be clearly available both to the carrier and to the bargaining representative, may not always be available to the individual employee. *Steele v. L. & N. R. Co.*, 323 U. S. 192; and see our brief, pp. 24-27, 48-49.

It is clear that no discrimination exists as between carriers and bargaining representatives. Both have been denied access to the courts for interpretation of their agreements for the reason that Congress has specifically provided a comprehensive and inclusive procedure for the handling of their disputes. If Congress had believed that peaceful labor relations on interstate railroads could be maintained by judicial action, it would have found no reason to enact a different procedure in the Railway Labor Act.

II

In Division II respondent urges that all of the prior decisions of this Court interpreting the Railway Labor Act, except the *Moore* case, should be confined to narrow limits. The argument is that this Court has held certain administrative procedures to be exclusive but has provided others which are merely cumulative to existing legal remedies. In short, the respondent argues that Congress intended to provide an exclusive remedy in the National Mediation Board and a non-exclusive remedy in the Adjustment Board.

Nothing in the Act or in the previous decisions of this Court lends support to this contention. The contention flies in the face of repeated pronouncements of this Court that:

“• • • Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate.”

The aim and purpose of Congress was to promote peace in rail industrial relations. As said in *Virginian Ry. Co. v. System Federation No. 40*, 303 U. S. 515:

“More is involved than the settlement of a private controversy without appreciable consequences to the public.”

Recognizing that judicial remedies suitable for determination of private controversies are not of aid in accom-

plishing the aim sought by Congress, it provided a comprehensive and all inclusive procedure for the adjustment, settlement and determination of rail labor controversies. That aim is not to be accomplished by finely wrought distinctions which would invite the parties to engage in a race as between the Adjustment Board and the Courts.

This Court has based its decisions in construing the Railway Labor Act on the well settled principle that where there is an available administrative remedy the parties should not be permitted to by-pass it and resort to judicial proceedings. Judicial intervention has been strictly limited to isolated situations in which the procedures of the Act could not provide the relief sought or rights under the Act would be lost in the absence of judicial enforcement.

The respondent attempts to distinguish the prior decisions of this Court, except the *Pitney* case, on the ground that these decisions turned on a narrow construction of the Railway Labor Act relative to creation of new rights and exclusive remedies therefor. On this theory, respondent argues that Congress created an exclusive remedy in the National Mediation Board but only a non-exclusive and cumulative remedy in the Adjustment Board. The invalidity of this distinction is demonstrated by respondent's conceded inability to reconcile the *Pitney* case with the narrow concept suggested by it.

The respondent nevertheless urges that the Congressional purpose in enacting the procedures provided in the Act be ignored; that this Court depart from the principles of its prior decisions; and that the Act be given a confusing and emasculating interpretation. The interpretation urged by respondent can only lead to chaos in the labor relations of the industry. Employees inevitably will resent the "game" proposed by respondent in which carriers and employee representatives would jockey for position as to which shall choose the forum for determination of disputed questions relating to interpretation and application of rail collective agreements.

It is submitted that a consideration of the Railway Labor Act as a whole conclusively negatives the thought that Congress left the parties to a race as between Adjustment Board and court or that Congress intended to make certain procedures exclusive and others non-exclusive.

III

Respondent next asserts that "the so-called doctrine of Primary Jurisdiction", frequently invoked by this Court in protection of Congressional intent in creating specialized administrative agencies, should not be applied to the National Railroad Adjustment Board.

Respondent states (Resp. Bf. p. 21) that "a complete answer" to petitioner's contention is the fact that the *Moore* and *Boswell* cases were decided by this Court subsequent to its decisions in *Great Northern Ry. Co. v. Merchants Elevator Co.*, 259 U. S. 393, and *Mitchell Coal and Coke Co. v. Pennsylvania R. Co.*, 230 U. S. 247.

The *Moore* and *Boswell* cases were decided by this Court in 1941 and 1943, respectively.

Respondent implies that petitioner proposes the application of the doctrine of primary jurisdiction to the Railway Labor Act procedures as a new and startling innovation whereas in fact this Court cited the *Great Northern* and *Mitchell Coal* cases, *supra*, in support of its decision in the *Pitney* case in 1946. It would appear that respondent contends that everything said by this Court in the *Pitney* case, in applying the principle of the *Great Northern* and *Mitchell Coal* cases was meaningless.

We have fully discussed the *Moore* and *Boswell* cases in our brief at pages 43-52. It is appropriate to point out that in our main brief we indicated that in our view the decision in the *Moore* case is not inconsistent with the subsequent decisions of this Court. Respondent contends throughout its brief, that if petitioner is to prevail the *Moore* case must be "overruled or modified". If the *Moore* case is given the construction urged for it by respondent,

then we submit that it is not in harmony with the subsequent decisions of this Court interpreting the Railway Labor Act and particularly its decision in the *Pitney* case.

Further in regard to primary jurisdiction, respondent urges that this principle is only applicable for the protection of uniform railroad rates. It may be observed that this Court in *Order of R. Telegraphers v. Railway Express Agency*, 321 U. S. 342, said:

“From the first the position of labor with reference to the wage structure of an industry has been much like that of the carriers about rate structures.”

Both rates of pay and rules governing working conditions are generally negotiated between the carriers of the United States and representatives of their employees in national wage and rule conferences. It was this development toward national uniformity throughout the large interstate railroad systems of the United States that led Congress to create a *National Adjustment Board* and a *National Mediation Board*. As shown by the Congressional hearings on the Railway Labor Act, the principle of uniformity was a paramount one leading to the amendments of the Railway Labor Act in 1934.

Uniformity is, of course, one but not the only consideration in the application of the principle of primary jurisdiction. This Court has also recognized the Congressional purpose in creating a *specialized* board for determination of intricate factual matters in technical fields. The respondent's only reference to this element of Congressional intent is found at page 18 of its brief in which it states that the case at bar involved only “a simple controversy over the interpretation of a contract”. In the trial court the respondent did not treat the issue as one so simple. Respondent sought to show customs and practices allegedly existing “since 1910” (R. 8, 79-86, 227, 230); to trace the history of the rules involved by reference to the orders and directives issued by the Director-General of Railroads in World War I (R. 172-183); and copious testimony was of-

ferred on the meaning of technical railroad terms. (R. 88, 174-194, 221, 215-220, 228, 247, 249-252, 325-362, 397-398, 409-414).

IV

In Division IV, respondent seeks to find support for its contentions in the legislative history of the 1934 amendments to the Railway Labor Act.²

Respondent's quotation from House Report No. 1944 is confusing. Respondent's brief would appear to indicate that the statement in the House Report to the effect that "the bill does not introduce any new principles into the existing Railway Labor Act" had reference to *all* of the proposed amendments, *including* those creating the National Railway Adjustment Board.

Reference to the report from which the quotation is taken demonstrates that the first two quotations set forth in respondent's brief specifically related to the proposed amendments to Section 2 of the Act. The report indicates that there were six numbered paragraphs limited to a discussion of the reasons for the amendment to Section 2.

The statement in the report that the bill did not introduce any new principles into the existing Railway Labor Act *had reference only* to the fact that the amendments to Section 2 did not change the provisions of the 1926 Act with respect to methods of conference, mediation and voluntary arbitration for settlement of major disputes.

Under an entirely new caption relating to the amendments to Section 3 of the Act is found the last quotation from the report quoted at the foot of page 28 of Respondent's brief. This was paragraph 7 of the report and commenced as indicated with the statement:

² The testimony of Mr. Joseph B. Eastman quoted at page 37 of the Brief for Petitioner appears at page 48 (not 47) of the hearings before the House Committee; and the second quoted paragraph appears at page 155 of the Hearings before the Committee on Industrial Commerce, United States Senate on S. 3266.

"The *second major purpose* of the bill is to provide *sufficient and effective* means for the settlement of minor disputes known as 'grievances', which develop from the interpretation and/or application of the contracts between labor unions and the carriers, fixing wages and working conditions. * * *"

The part omitted from the quotation is material and is as follows:

"The present Railway Labor Act provides for the establishment of boards of adjustment by agreement. In many instances, however, the carriers and employees have been unable to reach agreements to establish such boards. Further, the present act provides that when and if such boards are established by agreement, the employees and the carriers shall be equally represented on the board.

"Many thousands of these disputes have been considered by boards established under the Railway Labor Act; but the boards have been unable to reach a majority decision, and so the proceedings have been deadlocked. These unadjusted disputes have become so numerous that on several occasions the employees have resorted to the issuance of strike ballots and threatened to interrupt interstate commerce to secure adjustment. This has made it necessary for the President of the United States to intervene and establish an emergency board to investigate the controversies. This condition should be corrected in the interest of industrial peace and of uninterrupted transportation service."

Following the conclusion of the further quotation from the report, as set forth in respondent's brief at page 29, the report proceeds with an analysis of the provisions of the proposed amendments relating to the creation and jurisdiction of the National Railroad Adjustment Board in subparagraphs (a) to (i) inclusive, the last paragraph being as follows:

"(i) Finally, the bill gives absolute freedom to the carriers and the employees to establish any other machinery upon which they may voluntarily agree. If

such voluntary machinery should be established, *then* the parties are exempt from the jurisdiction of this National Board."

We respectfully submit that an examination of the legislative history and background of rail labor legislation clearly establishes that Congress in creating the National Railroad Adjustment Board intended to create a specialized agency having primary jurisdiction over controversies such as presented in the case at bar.

V.

Finally, respondent contends that the decree of the trial court did not interfere with petitioner's rights of collective bargaining. Respondent makes the suggestion, as it did in the trial court, that petitioner may bargain with respondent for a new contract. This suggestion begs the issue.

The pending controversy between petitioner and respondent related to the proper interpretation and application of an existing agreement. Both parties had the mandatory obligation of making every reasonable effort to settle this controversy in conference.

The trial court entered a decree which it described as settling this controversy. It is no answer for respondent to suggest that petitioner accept the decree and serve notice of intent to negotiate a new contract. Petitioner had that right before the decree. It also had the right before the decree to endeavor to settle the pending controversy, which right the decree destroyed.

Conclusion.

Respondent in footnotes to its brief has cited numerous decisions. None of these decisions, however, involve the specific issue now presented to this Court. Most of these

decisions were decided prior to *Order of Railway Conductors v. Pitney*, 326 U. S. 561. Furthermore, these cases did not involve actions brought by a carrier against a rail bargaining agent for a declaratory decree interpreting the collective agreement but were suits by individual employees and have no relevance to the issue in the case at bar.

Respondent bottoms its entire argument upon *Moore v. Illinois Central R. Co.*, 312 U. S. 630. The contentions now urged by respondent were made to this Court in the Brief For Petitioner filed in the *Pitney* case, *supra*. At page 24 of that brief petitioner there urged:

"Furthermore, this court held in *Moore v. Illinois Central R. Co.*, 312 U. S. 630 and *Washington Terminal Co. v. Boswell*, 124 F. (2nd) 235 (App. D. C.), affirmed by this court in an equally divided opinion (319 U. S. 732) that such administrative remedies as are available through the adjustment board are *not exclusive and do not prevent the bringing of a court action under a contract.*"

In the petition for rehearing filed in the *Pitney* case, petitioner again argued that the suit could be maintained under the *Moore* case and stated that the decision in the *Pitney* case " * * * compels a statutory representative to seek relief in the hands of the adjustment board as a prerequisite to judicial relief *contrary to the principle announced by this Court in the Moore case.*"

Thus in the submission of the *Pitney* case, this petitioner argued to this Court, as respondent now does, that the Railway Labor Act merely provided a permissive remedy in the Adjustment Board, that this Court had determined in the *Moore* case that such procedure was not compulsory in nature or exclusive in character, and that there was no requirement that the parties seek an adjustment board de-

termination as a prerequisite to judicial relief. The same arguments made by respondent here were there urged to this Court and were there overruled.

We therefore submit that this Court accordingly held that the *Moore* case is not susceptible of the interpretation which petitioner in the *Pitney* case there sought to place upon it, and which respondent in the case at bar now urges.

Respectfully submitted,

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NOV 28 1949

CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 438.

ORDER OF RAILWAY CONDUCTORS OF AMERICA, an unincorporated Association, *Petitioner,*

v.

SOUTHERN RAILWAY COMPANY, a corporation organized and existing under the laws of the State of Virginia, *Respondent.*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Supreme Court of the United States

OCTOBER TERM, 1949.

No. 438.

ORDER OF RAILWAY CONDUCTORS OF AMERICA, an unincorporated Association, *Petitioner*,

v.

SOUTHERN RAILWAY COMPANY, a corporation organized and existing under the laws of the State of Virginia, *Respondent*.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Opinions of the Court Below.

The first opinion of the Supreme Court of South Carolina in this case is reported in 210 S. C. 121, 41 S. E. (2d) 774, and is set forth in the record at pages 31-43. The second opinion has not yet been officially reported, but is reported in 54 S. E. (2d) 816, and is set forth in the record at pages 557-571.

Jurisdiction of This Court.

The petitioner seeks to invoke the jurisdiction of this Court under Section 1257(3) of Title 28, United States Code. As the validity of no statute of the United States

or of South Carolina has been questioned, presumably the petitioner is claiming some title, right, privilege or immunity under the statutes of the United States.

Statutes Involved.

The petitioner rests its case on the provisions of the Railway Labor Act, 45 U. S. C. § 151 *et seq.*, while the respondent contends that the suit falls squarely under the provisions of the declaratory judgment act of the State of South Carolina, § 660, Code of Laws of South Carolina, 1942, as was held by the South Carolina Supreme Court in its two unanimous opinions.

Statement of the Case.

This action was instituted in the Court of Common Pleas for Charleston County, South Carolina, against the petitioner by Southern Railway Company in July, 1945, under the declaratory judgment act of South Carolina, Code § 660, for the purpose of obtaining a construction of a written contract between the plaintiff, respondent here, and the petitioner, Order of Railway Conductors of America. The petitioner attempted to remove the case to the United States District Court, but the case was remanded for lack of a federal question. *Southern Railway Co. v. Order of Railway Conductors*, 63 F. Supp. 306.

The question presented by the complaint is whether industrial switching movements on an industry track at Pregnall, South Carolina, an intermediate point on plaintiff's line between Charleston and Branchville, South Carolina, are part of the service trips of conductors of local freight trains between those points, as contended by plaintiff and held by the courts below; or whether, as contended by petitioner, the conductors are entitled to a full extra day's pay for performing this incidental and customary switching service. (R. 1-2).

In addition to its answer, raising similar defenses, the petitioner filed a demurrer to the complaint based solely on the Railway Labor Act (45 U. S. C. § 151 *et seq.*) and which alleged that the suit is one involving a dispute concerning the application and interpretation of a collective bargaining agreement between plaintiff and defendant which is wholly within the terms of the Railway Labor Act; that the Railway Labor Act provides the sole and exclusive means and procedure for settling such disputes and that consequently the dispute is not within the jurisdiction of the courts of South Carolina. The demurrer also was based on a contention that the court, in the exercise of its discretion, should not attempt to hear the case because of the remedy provided by the Railway Labor Act. (R. 25-29). The trial court sustained the demurrer (R. 29-31), but the Supreme Court of South Carolina reversed the order in its opinion reported in 210 S. C. 121, 41 S. E. (2d) 774 (R. 31-43), holding that "the Railway Labor Act did not oust the courts of jurisdiction to interpret an agreement between a carrier and its employees, even where the dispute with respect to the agreement was one which, under the Act, might have been, but was not, submitted to the National Railroad Adjustment Board". (R. 38). The court in doing so relied on the decision in *Moore v. Illinois Central R. Co.*, 312 U. S. 630, as controlling.

Following the reversal the case came on for trial in the court of common pleas at Charleston, South Carolina, at which time extensive evidence was introduced by both sides. (R. 50-477). Thereafter, on August 30, 1947, the trial court filed its decree awarding plaintiff the declaratory judgment prayed in its complaint. (R. 512-528). The facts established by the testimony are so fully reviewed in the trial court's decree that we deem it unnecessary to repeat them here. We respectfully refer the Court to the decree for a full statement of all the pertinent facts. (R. 512-528).

Inasmuch as the petitioner mistakenly states that the dispute was still in negotiation, it is pointed out that not

only did the complaint allege that the claims had been appealed to the highest officer of the carrier and formally rejected, but the trial court also so specifically found. (R. 515). The record therefore shows that negotiations and conferences had been completed as contemplated by the Railway Labor Act, and nothing remained to be done to enable the parties to submit the dispute to the courts or the Adjustment Board, as they, or either of them, might elect.

Moreover, as later pointed out by the Supreme Court of South Carolina, it was shown by the testimony that the dispute was not submitted by petitioner to the National Railroad Adjustment Board until after this suit was brought and answer had been filed by the defendant-petitioner.

Petitioner in due course appealed from the final judgment of the trial court to the Supreme Court of South Carolina and again renewed its objections and exceptions under the Railway Labor Act. (R. 529-535). The South Carolina Supreme Court, again in a unanimous decision, affirmed the final judgment and decree for the reasons stated by the trial court in its decree, which was ordered reported. (R. 557-571).

Question Presented.

Although petitioner states the question presented by its application in seven different ways (Petition, pp. 8-9) the only substantial issue involved is whether the South Carolina Supreme Court correctly applied the decision in *Moore v. Illinois Central R. Co.*, 312 U. S. 630 when it held that:

“ * * * the Railway Labor Act did not oust the courts of jurisdiction to interpret an agreement between a carrier and its employees, even where the dispute with respect to the agreement was one which, under the Act, might have been, but was not, submitted to the National Railroad Adjustment Board. * * * ” (R. 38).

ARGUMENT.

The respondent submits that a writ of certiorari should be denied in the exercise of the Court's discretion for petitioner's failure to show a special and important reason therefor. In the following argument it will be shown (1) that the only federal question involved in this case was decided in full accord with the applicable decisions of this Court as to the proper construction of the provisions of the Railway Labor Act; (2) that the decision is not in conflict with the decision in *Order of Railway Conductors v. Pitney*, 326 U. S. 561; (3) that there is no conflict between the decisions of the state courts and the federal courts; and (4) that there has been no departure from the accepted and usual course of judicial proceedings requiring a review by this Court in the national interest.

I.

The South Carolina Supreme Court Was in Complete Accord With the Applicable Decision of This Court When it Followed *Moore v. Illinois Central R. Co.*, 312 U. S. 630.

The very question which petitioner here seeks to raise was decided by this Court on March 31, 1941 in *Moore v. Illinois Central R. Co.*, 312 U. S. 630. There it ~~was~~ squarely held that the procedure before the National Railroad Adjustment Board was not an exclusive remedy and that a party was not compelled to present its claim to such Board, but had the choice of resorting to a Court of competent jurisdiction in the first instance. It was also held therein that the party need not seek an adjustment of the controversy as provided in the Railway Labor Act as a prerequisite to the bringing of an action in the state court.

The decision in the *Moore Case* has never been questioned by this Court or modified in any respect, but in fact was followed in *Washington Terminal Co. v. Boswell*, 124 F.

(2d) 235, affirmed 319 U. S. 732, where Associate Justice Rutledge writing for the United States Court of Appeals for the District of Columbia said:

"* * * The decision (*Moore v. Illinois Central R. Co.*, 312 U. S. 630) establishes that in such circumstances the Act has neither excluded the general jurisdiction of the Courts nor made exhaustion of the administrative remedy prerequisite to its exercise, for decision of controversies which might be determined by the statutory method. At the threshold of controversy accordingly, the disputants have alternate routes which they may follow. One is entirely judicial without regard to the Railway Labor Act. The other is administrative and judicial, according to its terms." (p. 238).

"The foregoing considerations are reinforced by the fact that the carrier under the decision in *Moore v. Illinois Central R. R.*, *supra*, can bring its suit on the contract, independently of the statute, prior to the time when the dispute is submitted to the Board. Until then, at least, it has its election to pursue the exclusively judicial remedy or to follow the administrative and judicial one provided by the Railway Labor Act. * * *" (p. 249).

Washington Terminal Co. v. Boswell, *supra*, was an action for a declaratory judgment brought by the railroad employer just as is the case here. The court did not hold that the form of action was not proper or that the action could not be brought by any party to the dispute. The ground of dismissal was that the dispute had already been submitted to the Adjustment Board prior to the institution of the suit. Here, however, the record is clear that the jurisdiction of the South Carolina courts had been invoked by the respondent months before the petitioner sought to submit the dispute to the Adjustment Board. It is thus seen that the South Carolina courts have decided this case in complete accord with the applicable decisions of this Court, as well as a multitude of decisions of both federal

and state courts which have consistently followed the *Moore Case*.*

Notwithstanding the fact that the courts have consistently followed the *Moore Case* in suits of this kind, the petitioner suggests that while the language used by Mr. Justice Black in that case was applicable to the situation there before the court, it "was not intended to be applicable and was not directed toward a suit between a rail carrier and the representative of its employees concerning interpretation of the collective agreement, the subject matter of which directly infringes on the jurisdiction of the Adjustment Board." (Petition pp. 14-15). But this argument overlooks the status of a collective bargaining agent such as petitioner in the case at bar in handling matters submitted to the Ad-

* See for example:

Adams v. New York, C. & St. L. R. Co. (C.C.A. 7, 1941), 121 F. (2d) 808;

Oil Workers Inter. Union, etc. v. Texoma Nat. Gas Co. (C.C.A. 5, 1945), 146 F. (2d) 62, cert. den. 324 U.S. 872, rehearing den., 325 U.S. 892;

Berryman v. Pullman Co. (D.C.W.D. Mo., 1942), 48 F. Supp. 542;

Austin v. Southern Pac. Co. (Cal. 1942), 50 C.A. (2d) 292, 123 P. (2d) 39;

Watson v. Missouri-Kansas-Texas R. Co. of Texas (Tex. Civ. App., 1943) 173 S.W. (2d) 357;

Texas and New Orleans R. Co. v. McCombs (Tex. 1944) 183 S.W. (2d) 716;

Evans v. Louisville & N. R. Co. (1940) 191 Ga. 395, 12 S.E. (2d) 611;

Delaware, Lackawanna & Western R. Co. v. Slocum (N. Y. Sup. Ct.), 183 Misc. 454, 50 N.Y.S. (2d) 313; (D.C. W.D.N.Y.) 56 F. Supp. 634; 269 App. Div. 467, 57 N.Y.S. (2d) 65; 274 App. Div. 950, 83 N.Y.S. (2d) 513; and 299 N.Y. 496, 87 N.E. (2d) 532 (1949).

Woodridge v. Denver and Rio Grande Western R. Co. (1948) 118 Colo. 25, 191 P. (2d) 882;

Beeler v. Chicago, Rock Island and Pac. Ry. Co. (C.C.A. 10, 1948), 169 F. (2d) 557.

Shipley v. Pittsburgh & L.E.R. Co. (D.C.W.D. Pa., 1949), 83 F. Supp. 722.

justment Board. For in *Elgin, Joliet and Eastern Ry. Co. v. Burley*, 325 U. S. 711, 327 U. S. 661, it was held that the collective bargaining agent could act in the handling of claims under the applicable contract only to the extent authorized by the individual employees involved, and could bind them only to that extent. It necessarily follows that the petitioner as a representative of conductor employees is in no different position with respect to the election of remedies than was the individual employee involved in the *Moore Case*.

The respondent respectfully submits that the petitioner has failed to show that the South Carolina decision has misapplied the authoritative ruling of this Court in the *Moore Case*.

II.

The Decision of the South Carolina Court is Not in Conflict With Order of Railway Conductors v. Pitney, 326 U. S. 561.

During the proceedings in the South Carolina courts, as it does again in its petition to this Court (p. 16), the petitioner contended that the Railway Labor Act provides an exclusive remedy not only in "jurisdictional" disputes within the cognizance of the National Mediation Board; but also in those types of disputes which are referable to the National Railroad Adjustment Board. The first part of this contention is sound, but the latter part is equally as erroneous.

It is settled law that "jurisdictional" disputes involving representation questions that are referable to the National Mediation Board are outside the jurisdiction of the courts. *Switchmen's Union of North America v. National Mediation Board*, 320 U. S. 297; *General Committee, etc. v. Missouri-Kansas-Texas R. Co.*, 320 U. S. 323; *General Committee, etc. v. Southern Pacific Co.*, 320 U. S. 338. But there is no suggestion that this case involves such a representation dispute. It is a simple controversy over the interpre-

tation of a contract involving the question whether this respondent's employees are entitled to a second day's pay under the contract for a short period of work performed during the course of their regular day's service.

The court below did not misconstrue the *Pitney Case*, *supra*, when it said that the *Pitney Case* did not overrule or modify the decision in *Moore v. Illinois Central R. Co.*, *supra*.

The petitioner's contention to the contrary is effectively and accurately answered in the opinion of the court below as follows: (R. 40-41).

"The *Pitney case* involved primarily a suit for an injunction, and was complicated by the dual function of the court—first, as a court required to direct the receivers how to conduct the business of the railroad; and, second, as a court of equity required to determine if an injunction should issue to enjoin the receivers from violating Section 6 of the Railway Labor Act. The case was further complicated by a jurisdictional dispute requiring the interpretation of two collective bargaining agreements, which it was alleged, overlapped.

"None of these conflicting features is present in the case now under consideration. In this case there is only one defendant, one contract, and one set of facts requiring the attention of the court in construing the agreement and disposing of the dispute. It might further be noted that the Supreme Court in the *Pitney case* did not hold that the Federal Court did not have jurisdiction. It merely held that in consideration of the complicated features of the case, the court should retain jurisdiction to stay action on the prayer for injunction in order to permit the parties to first have the two contracts interpreted by the administrative procedure provided in the Railway Labor Act. Nowhere in the opinion of the court do we find any reference made to the case of *Moore v. Illinois Central R. Co.*, *supra*. If it had been the intention of the court to overrule the *Moore Case* which was decided in 1941, we think this would have been done in specific language."

A similar answer was made to petitioner's theory by the New York and Colorado courts in *Delaware, Lackawanna and Western R. Co. v. Slocum*, (1949) 299 N. Y. 496, 87 N. E. (2d) 532; and *Wooldridge v. Denver and Rio Grande Western R. Co.* (1948) 118 Colo. 25, 191 P. (2d) 882.

III.

There is No Substantial Conflict Between the Decisions of the State Courts and the Lower Federal Courts.

Petitioner is mistaken in saying that the lower federal courts have denied judicial power to adjudicate disputes of this nature and have held that the Adjustment Board provides the initial and primary remedy. All of the cases cited by petitioner (Petition, p. 11) are cases which followed the course suggested in the *Pitney Case*, *supra*. That the federal courts in those cases recognized that they had jurisdiction, but were merely exercising their discretion to give the parties an opportunity first to go to the Adjustment Board, is well demonstrated by the order entered by Judge Strum in the *Atlantic Coast Line Case* reproduced at page 27 of the Petition as follows:

"1. The motion of Brotherhood of Locomotive Firemen and Enginemen (filed March 9, 1948) for leave to intervene is granted.

2. Plaintiff's prayer for declaratory judgment is denied. The cause is retained on the docket in order to afford the parties an opportunity to apply to the Railway Adjustment Board for an interpretation of the labor contracts involved, after which this Court will consider what, if any, duty rests upon it with respect to the controversy."

Of course, if the court had no jurisdiction, it could not have held the case on the docket. That the court might later proceed with the exercise of its jurisdiction without an Adjustment Board award is further demonstrated by what has happened in the case of *Missouri-Kansas-Texas R. Co. v. Randolph*, (CCA 8) 164 F. (2d) 4, one of the cases mis-

takenly relied on by petitioner. As directed by the Circuit Court of Appeals, the District Court exercised its *equitable discretion* to give the Adjustment Board the first opportunity to interpret the collective bargaining agreements involved. However, the plaintiffs were unsuccessful in receiving relief through the Adjustment Board, and the District Court on August 10, 1949 granted them leave to reopen the case upon the showing of the futile efforts resulting from the procedure outlined by the Court of Appeals. The opinion of the District Court for the Western District of Missouri which thus so clearly shows that the federal courts have always recognized their jurisdiction in these cases, but were merely exercising an equitable discretion to stay or delay action thereunder, is reported in 85 F. Supp. 846.

Shipley v. Pittsburgh & L. E. R. Co. (D. C. W. D. Pa.) 83 F. Supp. 722, is a recent example of the recognition of jurisdiction by federal courts in suits involving the interpretation of railroad collective bargaining contracts. There the suit was brought by a large group of railroad employees, including many conductors represented by petitioner here, claiming damages for breach of contract by the railroad defendant. In a carefully considered opinion rendered March 6, 1949, Judge Gourley held that the court had jurisdiction notwithstanding the remedy before the Adjustment Board, and, after interpreting the contract, made the necessary findings to dispose of the case.

It is respectfully submitted that it is thus shown that the lower federal courts are not in substantial conflict with the State courts on the proper interpretation and application of the Railway Labor Act. The only difference of opinion is as to the exercise of equitable discretion. Petitioner has not shown any abuse of discretion on the part of the courts below. On the contrary, there clearly was not any abuse of discretion by the South Carolina courts in this case. The declaratory judgment was granted only after a careful consideration of all the facts and in the light of the administrative remedy under the Railway Labor Act.

IV.

Petitioner Has Not Shown Any Departure From the Accepted and Usual Course of Judicial Proceedings as to Require a Review in the National Interest.

Petitioner argues in support of its application that the decision is of national importance, but fails to support the assertion beyond the unsupported statement that frequent intervention by state courts in disputes being progressed under the Railway Labor Act will inevitably invite industrial strife and interference with interstate commerce throughout the United States.

This is a strange position for the petitioner to take, for this decision is by no means novel. Not only has the jurisdiction of the courts been recognized ever since the passage of the Railway Labor Act, but since the decision in *Moore v. Illinois Central R. Co.*, *supra*, it has been exercised by the courts, both federal and state, over and over again as shown above (p. 7). Moreover, South Carolina does not stand alone in approving declaratory judgment relief in these cases; it has been joined by New York, Colorado, and Texas, the only states that have considered the precise question. *Delaware, Lackawanna and Western v. Stocum*, (1949) 299 N. Y. 496, 87 N. E. (2d) 532; *Wooldridge v. Denver and Rio Grande Western R. Co.* (1948) 118 Colo. 25, 191 P. (2d) 882; *Denver and Rio Grande Western R. Co. v. Brotherhood of Railroad Trainmen*, decided by the State District Court of Denver, Colorado, November 18, 1948 (See Petition p. 24); and *Texas and Pacific Ry. Co. v. Brotherhood of Railroad Trainmen*, No. 07489, decided July 11, 1949 by the Texas District Court of Bowie County, Texas.*

In the long history of court intervention in matters pertaining to the interpretation of railroad collective bargaining contracts, petitioner points to no case where court ac-

* The pertinent Conclusions of Law are contained in a supplementary order filed on July 21, 1949, which is reproduced herein as an appendix.

tion has resulted in the "industrial strife and interference with interstate commerce," which petitioner professes to fear.

On the contrary, the only time when great industrial strife and interference with interstate commerce has occurred by reason of disputes like the one here involved, was the recent strike of operating personnel (including members of petitioner) on the Missouri Pacific System. The Court will take judicial notice that in that case strife and interference was the result of the refusal of the unions and their members to follow the orderly processes of the **Railway Labor Act** by submitting their cases to the Adjustment Board, which they are here so solicitously defending and espousing. That stoppage of interstate commerce in no way resulted from any court of competent jurisdiction attempting to exercise jurisdiction for the purpose of declaring the rights of the disputants under the applicable collective agreements.

The respondent submits that if there be dissatisfaction among the railroad unions because the courts exercise jurisdiction in these cases, the proper authority for them to appeal to is the Congress which has full power to amend the **Railway Labor Act** and make the administrative remedy exclusive if it deems that to be in the public interest. The courts, however, have no such power, and to grant the petitioner's application in this case will not serve any useful purpose.

Conclusion.

For all the reasons and upon the authorities above set out, we respectfully pray this Court to deny the petition.

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APPENDIX.

IN THE DISTRICT COURT OF BOWIE COUNTY, TEXAS,
102ND JUDICIAL DISTRICT.

No. 07489.

THE TEXAS AND PACIFIC RAILWAY COMPANY, ET AL.,

v.

BROTHERHOOD OF RAILROAD TRAINMEN, ET AL.

Pursuant to the request of the plaintiffs under Rule 298, Rules of Civil Procedure of the State of Texas, made by said plaintiffs within five (5) days after the original Findings of Fact and Conclusions of Law were filed by the trial court with the Clerk thereof, the Court makes and files the following additional Conclusions of Law, to wit:

A.

I conclude, as a matter of law, that in dispute of the character involved in this suit, this Court, as a Court of general jurisdiction, has concurrent jurisdiction with the National Railroad Adjustment Board, to settle and adjudicate the same, and that since such dispute was filed in this Court before it was filed with the National Railroad Adjustment Board this Court has exclusive jurisdiction to try this cause, and to enter a declaratory judgment in respect of such dispute.

B.

I conclude, as a matter of law, that the number of persons constituting the class or craft of yardmen is so large as to make it impracticable to bring them all before the Court.

in this proceeding, and that the defendants named in this suit fairly insure the adequate representation of all of said class or craft of yardmen, and that the facts and circumstances involved in this proceeding are the same with respect to the class or craft of yardmen employed by plaintiffs at Texarkana, Arkansas-Texas, as they are with respect to the defendants Hendrickson, Ellette, Goltra, Peters, Crudup and Richardson, and that there is a common question of law affecting the rights of said class or craft of yardmen and the parties named therein, and that a common relief is sought by plaintiffs, and based thereon, that the parties set forth in Paragraph III, of Defendants' First Amended Answer as being interested and not parties to said suit, are not necessary parties thereto.

C.

I further conclude, as a matter of law, that the plaintiffs are entitled to judgment as prayed for in Subdivisions 1, 4 and 5, of the prayer contained in Plaintiffs' Original Petition.

(Signed) H. L. DALBY,
Judge Presiding.

Dated: July 21, 1949.

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CHARLES ELMORE CROSBY

IN THE
Supreme Court of the United States

OCTOBER TERM, 1949.

—
No. 438.
—

438

ORDER OF RAILWAY CONDUCTORS OF AMERICA, an unincorporated association, *Petitioner*.

v.

SOUTHERN RAILWAY COMPANY, a corporation organized and existing under the laws of the State of Virginia.

—
On Writ of Certiorari to the Supreme Court of the State of South Carolina.

—
BRIEF FOR RESPONDENT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 438.

ORDER OF RAILWAY CONDUCTORS OF AMERICA, an unincorporated association, *Petitioner*.

v.

SOUTHERN RAILWAY COMPANY, a corporation organized and existing under the laws of the State of Virginia.

On Writ of Certiorari to the Supreme Court of the State of South Carolina.

BRIEF FOR RESPONDENT.

OPINIONS BELOW.

The first opinion of the Supreme Court of South Carolina in this case is reported in 210 S. C. 121, 41 S. E. (2d) 774, and is set forth in the record at pages 31-43. The second opinion has not yet been officially reported, but is reported in 54 S. E. (2d) 816, and is set forth in the record at pages 557-571.

JURISDICTION OF THIS COURT.

The final judgment and decree of the Supreme Court of South Carolina was entered August 15, 1949. Petition for writ of certiorari was filed October 29, 1949, and was granted on December 12, 1949, 94 L. Ed. (Adv.) 198, 70 Sup. Ct. 251. The jurisdiction of the Court was invoked under Section 1257(3) of Title 28, United States Code.

STATUTES INVOLVED.

This controversy involves the construction and application of the Railway Labor Act, 45 U. S. C., § 151 *et seq.*, as bearing on the jurisdiction of the courts of South Carolina under the Declaratory Judgment Act of that State, South Carolina Code, 1942, § 660. The provision of the Railway Labor Act especially pertinent here is § 3 First (i), 45 U. S. C., § 153 First (i), which reads:

“The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.”

STATEMENT OF THE CASE.

This action was brought in the Court of Common Pleas for Charleston County, South Carolina, by respondent, an interstate railroad company, against petitioner, a railway labor organization which is the duly accredited representative of the conductors employed by respondent. The action was pursuant to the Declaratory Judgment Act, South

Carolina Code, 1942, § 660, and sought to obtain the construction of a written contract between petitioner and respondent.

The question presented by the complaint is whether industrial switching movements on an industry track at Pregonall, South Carolina, an intermediate point on plaintiff's line between Charleston and Branchville, South Carolina, are a part of the service trips of conductors of local freight trains between those points, as contended by respondent and held by the courts below; or whether, as contended by petitioner, the conductors are entitled to a full extra day's pay for performing this incidental and customary switching service (R. 1-2).

In addition to its answer, raising similar defenses, the petitioner filed a demurrer to the complaint based solely on the Railway Labor Act (45 U. S. C. § 151 *et seq.*) and which asserted that because the suit is one involving a dispute concerning the application and interpretation of a collective bargaining agreement between the parties, the Railway Labor Act provides the sole and exclusive means and procedure for settling such disputes and that consequently the dispute is not within the jurisdiction of the courts of South Carolina. The demurrer also was based on a contention that the court, in the exercise of its discretion, should not proceed to hear the case, but should defer to the remedy provided by the Railway Labor Act (R. 25-29). The trial court sustained the demurrer (R. 29-31), but the Supreme Court of South Carolina reversed the order in its opinion reported in 210 S. C. 121, 41 S. E. (2d) 774 (R. 31-43), holding that "the Railway Labor Act did not oust the courts of jurisdiction to interpret an agreement between a carrier and its employees, even where the dispute with respect to the agreement was one which, under the Act, might have been, but was not, submitted to the National Railroad Adjustment Board" (R. 38). The court below, in reversing the order sustaining the demurrer, relied on the decision in *Moore v. Illinois Central R. Co.*, 312 U. S. 630, as controlling.

Following the reversal, the case came on for trial in the Court of Common Pleas at Charleston, South Carolina, at which trial extensive evidence was introduced by both sides (R. 50-477). Thereafter, on August 30, 1947, the trial court filed its decree awarding plaintiff the declaratory judgment prayed in its complaint (R. 512-528). The facts established by the testimony are so fully reviewed in the trial court's decree that we deem it unnecessary to repeat them here. We respectfully ask the Court to look to the decree for a full statement of all the pertinent facts (R. 512-528), rather than to the argumentative analysis of the case set forth in petitioner's brief (Bf. pp. 4-11), with much of which we take issue, and the greater part of which relates to the merits, which are not before this Court for review.

Inasmuch as the petitioner mistakenly states (Bf. p. 11) that the dispute was still in negotiation at the time the action was begun, we point out that the record shows conclusively that the claim here asserted by respondent had been appealed to the highest officer of the carrier and had been formally rejected (R. 159-169, 321), and the trial court so found (R. 515). The record therefore shows that negotiations and conferences had been completed as contemplated by the Railway Labor Act, and nothing remained to be done, at the time this suit was filed, to enable the parties to submit the dispute to the courts or to the National Railroad Adjustment Board, as they, or either of them, might elect.

Moreover, as pointed out by the court below, it was shown by the testimony that the dispute was not submitted by petitioner to the Adjustment Board until after this suit was brought and answer had been filed by the defendant-petitioner (R. 557-558).

Petitioner in due course appealed from the final judgment of the trial court to the court below and again renewed its objections and exceptions under the Railway Labor Act (R. 529-535). The court below, again in a unanimous decision, affirmed the final judgment and decree for

the reasons stated by the trial court in its decree, which was ordered reported (R. 557-571).

COUNTERSTATEMENT OF QUESTION PRESENTED.

Although petitioner states the question presented in seven different ways (Bf. p. 17), the only substantial issue involved is whether the court below correctly applied the decision in *Moore v. Illinois Central R. Co.*, 312 U. S. 630, when it held:

“that the Railway Labor Act did not oust the courts of jurisdiction to interpret an agreement between a carrier and its employees, even where the dispute with respect to the agreement was one which, under the Act, might have been, but was not, submitted to the National Railroad Adjustment Board. * * *” (R. 38)

SUMMARY OF ARGUMENT.

The only question before this Court for review, namely, whether the Railway Labor Act precludes the South Carolina courts from taking jurisdiction of this suit brought under the provisions of the State Declaratory Judgment Act, was properly decided by the court below when it held it had jurisdiction notwithstanding the alternative and cumulative remedy provided by the processes of the National Railroad Adjustment Board because, as will be shown in the following argument:

1. The decision in the case of *Moore v. Illinois Central R. Co.*, 312 U. S. 630, expressly held that the Railway Labor Act does not exclude the exercise of jurisdiction by the ordinary judicial courts in suits for the enforcement of contracts respecting rules and working conditions of railroad employees as embodied in collective bargaining agreements.

2. The *Moore Case* still stands as the governing authority in this case, since it has not been overruled or modified by the decision in *Order of Railway Conductors v. Pitney*, 326 U. S. 561 or any other subsequent decisions of this Court.

3. The so-called doctrine of "Primary Jurisdiction" has no valid application to Adjustment Board procedure, and does not require that the *Moore Case* be overruled.

4. The legislative history of the Railway Labor Act confirms and supports the decision in the *Moore Case*, and shows that Congress did not intend by the creation of the Adjustment Board to effect the complete and radical change in the character and legal effect of the adjustment procedure for handling railway labor disputes which petitioner here contends for.

5. The decree of the South Carolina court leaves petitioner free to enjoy all its rights and immunities guaranteed and contemplated by the Railway Labor Act.

ARGUMENT.

I. That the Railway Labor Act Does Not Exclude the Exercise of Jurisdiction by the Ordinary Judicial Courts for the Enforcement of Contracts Respecting Rules and Working Conditions Was Definitely Decided by This Court in the Moore Case.

Even prior to the decision of this Court in *Moore v. Illinois Central R. Co.*, 312 U. S. 630, it was generally held by the decided cases that, since the enactment of the Railway Labor Act, and in spite of the provisions thereof establishing a statutory adjustment procedure, parties to railroad collective bargaining agreements might resort to the ordinary judicial courts for the enforcement of contracts between them respecting rules and working conditions, either by actions for damages or by bill for an injunction or declaratory judgment.¹

¹ Among such cases are the following:

Louisville & N. R. Co. v. Bryant, 263 Ky. 578, 92 S. W. (2d) 749

Floristano v. Northern Pacific Ry. Co., 198 Minn. 203, 269 N. W. 407.

McCrory v. Kurn, 101 S. W. (2d) 114 (Mo. App.)

That the Railway Labor Act did not oust the jurisdiction of the courts to interpret and enforce an agreement between a carrier and its employees, even where the dispute with respect to the agreement was one which, under the Act, might have been, but had not been, submitted to the National Railroad Adjustment Board, was clearly determined in *Moore v. Illinois Central R. Co.*, 312 U. S. 630.

The *Moore Case* involved a suit for damages brought by a member of the Brotherhood of Railroad Trainmen against the railroad company based on an alleged wrongful discharge contrary to the terms of the contract between the railroad and the Brotherhood, federal jurisdiction being based on diversity of citizenship. In holding that the plaintiff need not seek an adjustment of the controversy as provided in the Railway Labor Act as a prerequisite to bringing an action in the ordinary courts, this Court said (312 U. S. 634-635):

“ * * * But we find nothing in that Act which purports to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in court. * * * It is to be noted that the section pointed out, § 153(i), as amended in 1934, provides no more than that disputes ‘may be referred . . . to the . . . Adjustment Board . . .’. It is significant that the comparable section of the 1926 Railway Labor Act (44 Stat. 577, 578) had, before the 1934 amendment, provided that upon failure of the parties to reach an adjustment a ‘dispute shall be referred to the designated Adjustment Board by the parties, or by either party . . .’. This difference in language, substituting ‘may’

McGee v. St. Joseph Belt Railway Co., 232 Mo. App. 639, 110 S. W. (2d) 389

Evans v. Louisville and Nashville R. R. Co., 191 Ga. 395, 12 S. E. (2d) 611

Dooley v. Lehigh Valley R. Co., 130 N. J. Eq. 75, 21 Atl. (2d) 334

Perras v. Terminal R. Ass'n. of St. Louis, 154 S. W. (2d) 417, (St. Louis Ct. of App.)

Nord v. Griffin, 86 F. (2d) 481 (C. C. A., 7th), cert. den., 300 U. S. 673.

for 'shall', was not we think, an indication of a change in policy, but was instead a clarification of the law's original purpose. For neither the original 1926 Act, nor the Act as amended in 1934, indicates that the machinery provided for settling disputes was based on a philosophy of legal compulsion. On the contrary, the legislative history of the Railway Labor Act shows a consistent purpose on the part of Congress to establish and maintain a system for peaceful adjustment and mediation voluntary in its nature. The District Court and the Circuit Court of Appeals properly decided that petitioner was not required by the Railway Labor Act to seek adjustment of his controversy with the railroad as a prerequisite to suit for wrongful discharge. • • •

The decision in the *Moore Case* has never been questioned by this Court or modified in any respect. It was followed in *Washington Terminal Co. v. Boswell*, 124 F. (2d) 235, affirmed 319 U. S. 732, where Associate Justice Rutledge writing for the United States Court of Appeals for the District of Columbia said:

"• • • The decision [*Moore v. Illinois Central R. Co.*, 312 U. S. 630] establishes that in such circumstances the Act has neither excluded the general jurisdiction of the courts nor made exhaustion of the administrative remedy prerequisite to its exercise, for decision of controversies which might be determined by the statutory method. At the threshold of controversy accordingly, the disputants have alternate routes which they may follow. One is entirely judicial, without regard to the Railway Labor Act. The other is administrative and judicial, according to its terms." (p. 238).

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"The foregoing considerations are reinforced by the fact that the carrier, under the decision in *Moore v. Illinois R. R.*, *supra*, can bring its suit on the contract, independently of the statute, prior to the time when the dispute is submitted to the Board. Until then, at least, it has its election to pursue the exclusively judicial remedy or to follow the administrative and judicial one provided by the Railway Labor Act. • • •" (p. 249).

Washington Terminal Co. v. Boswell, supra, was an action for a declaratory judgment brought by the railroad employer just as is the case here. The court did not hold that the form of action was not proper or that the action could not be brought by any party to the dispute. The ground of dismissal was that the dispute had already been submitted to the Adjustment Board prior to the institution of the suit. Here, however, the record is clear that the jurisdiction of the South Carolina courts had been invoked by the respondent months before the petitioner sought to submit the dispute to the Adjustment Board. (R. 558) It is thus seen that the South Carolina courts have decided this case in complete accord with the *Moore* and *Boswell* cases, of which the South Carolina Supreme Court said in its first opinion (R. 39-40):

"In view of these decisions, it is our opinion that the Congress intended that controversies of the character set forth in this case may be adjusted in either of two ways: First, under the authority of the Act by submitting the dispute to the National Railroad Adjustment Board; or, second, by exercising the common law rights of any party to bring an action to construe a contract and have his rights declared. There is concurrent jurisdiction of the subject-matter of a suit of this kind, either by a court of competent jurisdiction or by the National Railroad Adjustment Board."

Notwithstanding the clear language to the contrary used in the opinion of the Court in the *Moore Case*, petitioner argues (Bf. pp. 43-52) that the *Moore Case* can be distinguished from the present case on two grounds.

The first ground on which petitioner seeks to distinguish the *Moore Case* is that because it was an action to recover damages for wrongful discharge, "the relief sought by Moore in the exercise of his *individual right* was not in direct conflict with the provisions and procedures provided in the Railway Labor Act" (Bf. p. 46).

But Moore's right to employment depended solely upon his contract of employment, which basically includes the

collective bargaining contract covering his class. (See *Illinois Central R. Co. v. Moore*, 112 F. (2d) 959,965). Unless that contract was violated, the discharge was not unlawful. Petitioner regularly files claims with the carriers claiming that employees have been discharged in violation of collective bargaining contracts. Obviously these are the basic types of cases that are specifically referable to the Adjustment Board under Section 3, First (i) of the Railway Labor Act which provides that disputes between an employee (singular) and a carrier "growing out of grievances or out of the interpretation or application of agreements . . . may be referred by petition" to the Adjustment Board. Thus this argument of petitioner falls, for there is hardly a claim filed for which an employee could not fall back on his common law rights and sue for damages rather than seek the limited type of relief awarded by the Adjustment Board for violation of contract rights and in disposing of grievances. This clearly was the view of the Tenth Circuit Court of Appeals in the recent case of *Beeler v. Chicago, R. I. & P. Ry. Co.*, 169 F. (2d) 557, cert. den., 335 U. S. 903, where it was said:

"If appellant's employment comes within the bargaining contract invoked, no one questions his right to maintain an action for damages for the breach thereof. See *Moore v. Illinois Cent. R. Co.*, 312 U. S. 630; *Union Pac. R. Co. v. Olive*, 9 Cir., 156 F. (2d) 737." (p. 559).

The second ground urged by petitioner for distinguishing this case from the *Moore* decision is based on the theory that there is a difference between a suit brought by an individual employee against the carrier and one between the carrier and an organization. The gist of the argument is that while the language used by the Court in the *Moore Case* was applicable to the situation there before the Court, it was not intended to be applicable to a suit between a rail carrier and the representative of its employees concerning interpretation of a collective bargaining agreement, the

subject-matter of which is within the jurisdiction of the Adjustment Board.

But this argument of petitioner overlooks the status of a collective bargaining agent, such as the petitioner in the case at bar, in the handling of claims of employees under the applicable contract in negotiations and when submitted to the Adjustment Board. For in *Elgin, Joliet and Eastern R. Co. v. Burley*, 325 U. S. 711 (in which the *Moore Case* is cited at page 720) and 327 U. S. 661, it was held that the collective bargaining agent could act in the handling of claims under the applicable contract only to the extent authorized by the individual employees involved and could bind them only to that extent. It necessarily follows that petitioner, as a representative of conductor employees, is in no different position with respect to the election of remedies than was the individual employee involved in the *Moore Case*.

Under petitioner's theory, an employee or group of employees, has an election of remedies in any case involving the interpretation of a collective bargaining contract, that is, by pursuing the common law remedy in the courts or by submitting the claims to the Adjustment Board. On the other hand, petitioner says that the Railway Labor Act took away the employer's right to submit such disputes to the courts to enforce its common law rights under the contract. There is nothing whatsoever in the Railway Labor Act to support a contention that Congress so intended to take the common law remedies away from either the employer or the employee, much less any basis for imputing to Congress a purpose to take the right away from one and not the other.

The case of *Shipley v. Pittsburgh & L. E. R. Co.*, (D. C. W. D. Pa.) 83 F. Supp. 722, illustrates the fallacy of petitioner's argument. There the suit was brought by a large group of railroad employees claiming damages for breach of contract by the railroad defendant because they had been required to do certain work which they claimed was not

proper for their assignment under the collective bargaining contract. The damages claimed were for an extra day's pay. Thus, the type of issue was exactly the same as in the case now before this Court, except that the parties were reversed. There, as here, the dispute was one which could have been, but had not been, submitted to the Adjustment Board, because the plaintiff employees preferred to use the remedy provided by the judicial courts. In a carefully considered opinion rendered March 8, 1949, the court held that it had jurisdiction notwithstanding the remedy before the Adjustment Board, and, after interpreting the contract, made the necessary findings to dispose of the case.

Under petitioner's contention, employees would have a choice of remedies, but the employer would be limited to the administrative remedy. If, as in the *Shipley Case, supra*, a group of employees has a right to invoke the court's jurisdiction to interpret the collective contract, plain justice and equity demand an equal right for the railroad employer. Otherwise, gross discrimination results. Moreover, to bar the employer from the courts, the Court would have to read into the Railway Labor Act a prohibition not necessary to carry out the purpose of Congress and not supported by the legislative history, as will be shown later. Obviously, there is no basis for a contention that the employer is barred from the courts because Congress intended an exclusive administrative remedy to be used when it is admitted that the employees can freely by-pass the administrative remedy.

Section 3, First (i) of the Act places all parties on an equal basis with respect to disputes involving interpretation of collective bargaining contracts. It provides that disputes "between an employee or group of employees and a carrier or carriers . . . shall be handled in the usual manner . . .; but, failing to reach an adjustment . . . may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board . . .". This language is permissive in the case of both an employee

and an employer. There is not a word to indicate that a different purpose was intended in the case of either employee or employer. There simply is no basis for interpreting the Railway Labor Act as requiring a discrimination against the railroad employer in the handling of these disputes by making the administrative remedy exclusive in its case, but not in the case of the employees.

The respondent respectfully submits that the petitioner has failed to show that the South Carolina decision has misapplied the ruling of the Court in the *Moore Case*.

II. The Moore Case Still Stands as the Governing Authority in This Case.

The soundness of the *Moore Case*, *supra*, has been consistently recognized by the courts, and it establishes a carrier's right to invoke the jurisdiction of the courts to interpret and apply its contract unless the administrative machinery provided in the Railway Labor Act has been previously invoked.²

Notwithstanding this settled course of adjudication, petitioner contends that this Court in effect overruled the *Moore Case*, or at least greatly modified its application to suits brought by individual employees for damages, by its decisions in the cases of *General Committee, etc. v. Missouri-Kansas-Texas R. Co.*, 320 U. S. 323; *Switchmen's*

² See for example, *Adams v. New York C. & St. L. R. Co.*, 121 F. (2d) 808, (C. C. A. 7th); *Oil Workers Inter. Union, etc. v. Texoma Gas Co.*, 146 F. (2d) 62, (C. C. A. 5th,) cert. den. 324 U. S. 872, rehearing den., 325 U. S. 893; *Berryman v. Pullman Co.*, 48 F. Supp. 542 (D. C. W. D. Mo.); *Austin v. Southern Pac. Co.*, (Cal.), 50 C. A. (2d) 292, 123 P. (2d) 39; *Watson v. Missouri-Kansas-Texas R. Co. of Texas* (Tex. Civ. App.), 173 S. W. (2d) 357; *Texas and New Orleans R. Co. v. McCombs* (Tex.), 183 S. W. (2d) 716; *Evans v. Louisville and Nashville R. Co.*, 191 Ga. 395, 12 S. E. (2d) 611; *Wooldridge v. Denver and Rio Grande Western R. Co.*, 118 Colo. 25, 191 P. (2d) 882; *Beeler v. Chicago, Rock Island and Pacific Ry. Co.*, 169 F. (2d) 557, (C. C. A. 10th.); *Kordewick v. Indiana Harbor Belt R. Co.*, 157 F. (2d) 753, (C. C. A. 7th.); and *Shipley v. Pittsburgh & L. E. R. Co.*, 83 F. Supp. 722 (D. C. W. D. Pa.)

Union v. National Mediation Board, 320 U. S. 297; *General Committee, etc. v. Southern Pacific Co.*, 320 U. S. 338; *Brotherhood of Railroad Trainmen v. Toledo, P. & W. R.*, 321 U. S. 50; *Steele v. Louisville and Nashville R. Co.*, 323 U. S. 192; and *Order of Railway Conductors v. Pitney*, 326 U. S. 561.

All of these cases are, however, clearly distinguishable and none of them affords any reason for departing from the sound law previously declared in the *Moore Case*, which was not mentioned by the Court in the opinions in any of the six cases relied on by petitioner.

All of these cases except the *Pitney Case* involved efforts of the plaintiffs to enforce substantive rights created by the Railway Labor Act. The first three were decided by the Court on November 22, 1943, and involved the designation or selection of collective bargaining representatives and the negotiation of changes in collective agreements, which are established as statutory rights by the Railway Labor Act, and were not based on any common law rights theretofore enforceable in the courts. In view of definite administrative procedures provided in the Act for selecting collective bargaining representatives and for changing collective agreements, this Court held that the statutory procedures are mandatory and resort to the courts is foreclosed. *General Committee, etc. v. Missouri-Kansas-Texas*, 320 U. S. 323; *Switchmen's Union v. National Mediation Board*, 320 U. S. 297; *General Committee, etc. v. Southern Pacific Co.*, 320 U. S. 338. The result so reached was merely an application of the well-settled doctrine that where a statute creates a new right and establishes a remedy for its enforcement, that remedy will be deemed the exclusive remedy for enforcement of the new right, unless the statute expressly provides otherwise; or, as it was tersely phrased in *Switchmen's Union v. National Mediation Board*, 320 U. S. 297, 301, "in such a case the specification of one remedy normally excludes another."

But those cases, and that doctrine, have no application where the right sought to be enforced is not one created by the statute. In such a case the administrative remedy created by the statute is merely cumulative to the existing legal remedies. Such is the present case. The Railway Labor Act established a new remedy, or adjustment procedure, for enforcement of collective bargaining agreements between carriers and their employees, by providing that such "disputes *may* be referred" to the National Railroad Adjustment Board.³ The deliberate use of the permissive "may" shows that Congress itself was advertent to the principles just discussed.

The Railway Labor Act did not create the substantive rights of the parties to collective bargaining contracts between carriers and their employees. Those rights are simple common law rights *ex contractu*, and they are no different now from what they were before enactment of the Railway Labor Act. This of course is the reason the courts without exception have held that an action on a collective bargaining contract is not one that "arises under the * * * laws * * * of the United States" within the meaning of Title 28, § 1331, U. S. Code.⁴

It is clear, therefore, that the three decisions in 320 U. S., involving representation of employees and the making of new contracts between carriers and their employees—matters which involve new substantive rights created by the Railway Labor Act—have no application whatever to a controversy involving the construction of an existing collective bargaining agreement, itself creating its own substantive rights under State law, such as existed in the *Moore Case* and exists in the case at bar.

³ All emphasis in this brief ours unless otherwise indicated.

⁴ *Lane v. Union Terminal Co.*, (N. D. Texas) 12 F. Supp. 204; *McDermott v. New York Central R. Co.*, (S. D. N. Y.) 32 F. Supp. 873; *Swartz v. Gardner*, (W. D. N. Y.) 44 F. Supp. 447; *Strauser v. Reading Co.* (D. C. E. D. Pa.) 80 F. Supp. 455; *Burke v. Union Pacific R. Co.*, (C. C. A. 10) 129 F. (2d) 844; *Barnhart v. Western Maryland R. Co.* (C. C. A. 4) 128 F. (2d) 709.

The decision in *Trainmen v. Toledo, P. & W. R.*, 321 U. S. 50, turned on a still narrower point not even remotely analogous to the issue in the *Moore Case*. There the question was whether the District Court properly issued an injunction which restrained the railroad's employees from interfering by violence with its property and interstate railroad operations. As stated in the Court's opinion "the sole issues that concern us are the existence of federal jurisdiction and whether the requirements of the Norris-LaGuardia Act (29 U. S. C. §§ 107, 108, 47 Stat. 71, 72) were satisfied." The court held that the mandatory requirements of the Norris-LaGuardia Act were not complied with for failure of complainant to make every reasonable effort to settle the dispute, and hence the courts lacked jurisdiction to grant an injunction. Of course, in the case now before the Court, there is no statutory requirement such as is provided in the Norris-LaGuardia Act to be met as a condition precedent to invoking the jurisdiction of the courts.

Steele v. Louisville and Nashville R. Co., 323 U. S. 192, unlike the case just discussed, was one in which the Court held that the courts have jurisdiction to consider a suit for breach of the duty of a duly authorized union representative under the Railway Labor Act to represent minority groups of employees without discrimination. As pointed out by the Court there is no administrative agency provided by the Act to afford relief in such cases. Insofar as the Adjustment Board procedure was concerned, the Court said there was no issue over the interpretation of the contracts so there was no need to decide the question of the necessity of exhausting that procedure.⁵ Again, as in the

⁵ The Court did say that even though the dispute were to be heard by the Adjustment Board, that Board could not give the relief sought to stop the alleged discrimination by the union. Care was taken, however, to point out that by referring to the failure of the Adjustment Board to consider some 400 cases involving complaints by individual members of a craft represented by a labor organization the Court was not to be considered as holding that there is no judicial power to require the Adjustment Board to consider such cases. (See 323 U. S. at 205-206).

other cases cited by the petitioner, not even a suggestion that the Court intended to overrule the *Moore Case* can be found in the *Steele Case* or in its companion case *Tunstall v. Brotherhood*, 323 U. S. 210, decided the same day.

Finally, the petitioner places main reliance on the decision in *Order of Railway Conductors v. Pitney*, 326 U. S. 561. That case involved the question of the extent to which a federal district court having charge of a railroad reorganization has power to adjudicate a dispute involving the railroad and two employee-accredited bargaining agents, in view of the provisions of the Railway Labor Act giving such power to the administrative agencies established thereunder. The dispute there arose as to whether the yard conductors represented by the Trainmen's Union or the road conductors represented by the Conductors' Union should operate certain trains within a yard. The district court had to act in a dual capacity because it had administrative charge of the railroad in bankruptcy. It first had to instruct its Trustees how to proceed and in so doing was obliged to interpret the union agreements. The conductors claimed that the work in question could not be taken from them and given to the trainmen without negotiating the work out of their contract and asked the court to enjoin such transfer of work unless such contract was changed by the method prescribed by the Railway Labor Act. The district court, therefore, had to determine whether there was any clear violation of a right given by Congress and in determining that question had to interpret judicially the conductors' agreement to determine whether it gave the conductors the work. If it did not, no negotiation of a new agreement was necessary. This Court held that the district court properly proceeded to interpret the agreement insofar as instructing its Trustees was concerned, but that it should have refrained in its discretion from interpreting the contracts as a basis for injunctive relief, in order to give the parties the opportunity to have the contracts interpreted by the Adjustment Board.

The important and controlling point, it appears, was the fact that the court had to interpret the contracts in two capacities, in the first of which it was identified with one of the parties to the dispute, so as to make it proper and desirable that it should pass the question to another tribunal for determination as between the parties, especially since Section 77 (n) of the Bankruptcy Act provides that "No judge or trustee acting under this Act shall change the wages or working conditions of railroad employees except in the manner prescribed" in the Railway Labor Act, 11 U. S. C. § 205 (n).

The *Pitney* decision does not hold that the matter was not justiciable. It does not deny to the courts the power to interpret contracts, but states only that under the peculiar circumstances present in that case the court of equity should as a matter of discretion stay its hand. Furthermore, the case was essentially one concerning the alteration of an existing contract, a case on the mediation rather than on the adjustment side of the statute. The suit was one for an injunction to prevent what was claimed to be a clear violation of a right given by the statute, not the contract, i.e., that the existing agreement be changed only in the manner prescribed by the Act.

There is nothing in the *Pitney Case* which interferes with the jurisdiction of the state courts in the present proceeding under the State Declaratory Judgment Act. There is no suggestion that this case involves a complicated dispute such as was present in the *Pitney Case* any more than did the *Moore Case*. Here it is a simple controversy over the interpretation of a contract between the petitioner and the respondent as to whether conductors will be paid an extra day's pay for work performed on their regular tour of duty on the industrial track serving the Aneur Corporation at Pregnall, South Carolina.

There are strong reasons inherent in the Railway Labor Act to support the rationale of the decision in *Moore v. Illinois Central*. An examination of the Act clearly shows

that a decision by the Adjustment Board under the Act is not final, binding, or conclusive. Such a decision is not self-executing and can not be enforced save by a suit in a court of competent jurisdiction in which all the issues are tried *de novo*. It was, therefore, with good reason that Congress made resort to the Adjustment Board in a case like that at bar permissive rather mandatory. It is indeed difficult to believe that if the Court, in its opinion in the *Pitney Case*, had intended to reject its previous interpretation of the Railway Labor Act in the *Moore Case*, it would not have said so.

The petitioner's contention to the contrary is effectively and accurately answered in the following excerpt from the opinion of the South Carolina Supreme Court in this case (R. 40-41):

"The *Pitney Case* involved primarily a suit for an injunction, and was complicated by the dual function of the court—first, as a court required to direct the receivers how to conduct the business of the railroad; and, second, as a court of equity required to determine if an injunction should issue to enjoin the receivers from violating Section 6 of the Railway Labor Act. The case was further complicated by a jurisdictional dispute requiring the interpretation of two collective bargaining agreements, which it was alleged, overlapped.

"None of these conflicting features is present in the case now under consideration. In this case there is only one defendant, one contract, and one set of facts requiring the attention of the court in construing the agreement and disposing of the dispute. It might further be noted that the Supreme Court in the *Pitney case* did not hold that the Federal Court did not have jurisdiction. It merely held that in consideration of the complicated features of the case, the court should retain jurisdiction to stay action on the prayer for injunction in order to permit the parties to first have the two contracts interpreted by the administrative procedure provided in the Railway Labor Act. Nowhere in the opinion of the court do we find any reference made to the case of *Moore v. Illinois Central R. Co.*, *supra*.

If it had been the intention of the court to overrule the *Moore Case* which was decided in 1941, we think this would have been done in specific language."

It is submitted that the decision in *Moore v. Illinois Central R. Co.*, *supra*, still stands as the governing authority in this case, and fully supports the judgment of the court below in taking jurisdiction under the South Carolina declaratory judgment statute, notwithstanding the alternative, cumulative and concurrent administrative remedy provided by the Railway Labor Act.

III. The So-Called Doctrine of "Primary Jurisdiction" Has No Valid Application to Adjustment Board Procedure, and Does Not Require That the Moore Case Should Be Overruled or Modified.

As we have shown above, the decision in the *Pitney Case* was based on the complicated situation arising out of the dual capacity in which the district court had to act due to its having administrative supervision of the railroad under the Bankruptcy Act in addition to its judicial functions. Obviously the Court's discussion of the remedies provided by the Railway Labor Act was for the purpose of showing the availability of a reasonable remedy which the district court could require the parties to exhaust prior to the exercise of its discretionary equitable powers. Nowhere in the opinion is it suggested that the Court intended to hold that the rule of primary jurisdiction should apply to all cases referable to the Adjustment Board. To infer such a result seems unreasonable since the Court did not even mention its earlier opinion in the *Moore Case* in which it said that an employee "was not required by the Railway Labor Act to seek adjustment of his controversy with the railroad as a prerequisite to suit for wrongful discharge." (312 U. S. at page 636).

Petitioner, however, continues to urge that the rule of primary jurisdiction should be applied to the Adjustment

Board just as it is to the Interstate Commerce Commission under the decisions in *Great Northern Ry. Co. v. Merchants Elevator Co.*, 259 U. S. 285, and *Mitchell Coal and Coke Co. v. Pennsylvania R. Co.*, 230 U. S. 247. A complete answer to this contention of petitioner would seem to be the fact that the *Moore* and *Boswell* cases, *supra*, were decided by the Supreme Court subsequent to those cases. None of the cases cited by petitioner holds that the Adjustment Board has primary jurisdiction of cases referable to it, and as we will show below the principle of those cases is not applicable here.

This doctrine to which appeal is made for the purpose of overruling the *Moore Case*, originated in *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426. In that case a shipper, without complaining to the Interstate Commerce Commission, brought suit in the courts against a carrier to recover for the payment of an allegedly excessive and unreasonable rate. The rate in question was in fact published in a tariff which the carrier had filed with the Commission, as required by the Interstate Commerce Act, and from which the carrier was not lawfully permitted to deviate. The question was whether, under these circumstances, the shipper was entitled to the judgment of a court as to the reasonableness of the rate or whether, under the Act, it was necessary that he should proceed through the Commission. He claimed that his right to proceed through the courts in the first instance was a common law right of which the statute should not be construed to deprive him. In approaching that contention this Court, speaking through Mr. Justice White, said (204 U. S. at p. 437):

"A statute will not be construed as taking away a common law right existing at the date of its enactment, unless that result is imperatively required; that is to say, unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory."

The Court, therefore, proceeded to examine what would be the effect of the exercise of the right claimed by the shipper under the circumstances of the particular case, and went on to say (204 U. S. at p. 440):

"* * * for if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that unless all courts reached an identical conclusion a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed, the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission and with the duty, *which the statute casts upon that body*, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed."

In other words, in view of the statutory requirement of uniform rates and in view of the fact that the Commission was the body charged by the statute with protecting and preserving rates in accordance with that statutory requirement, it followed necessarily that any procedure which defeated the power of the Commission to maintain the required uniformity of rates would render the statutory mandate nugatory. Hence, it was held that a right to proceed in the courts in disregard of the procedure through the Commission was necessarily inconsistent with the provisions of the statute.

The ruling was not to the effect that merely because there was an available procedure through an administrative body that procedure must be used to the exclusion of the procedure through the courts; it was only to the effect that where the procedure through the courts, rather than through the administrative body, would have some specific result in rendering nugatory a provision of the Act, like that which required uniformity of rates, the administrative procedure

would to that extent be held to oust the jurisdiction of the courts.

It therefore seems clear that the primary jurisdiction doctrine is not in any sense a doctrine of general application to administrative bodies as such, but applies only where special reasons exist with respect to the functions and nature of the particular administrative body.

The doctrine of the *Abilene Oil Case* has not been held to require that the courts should be ousted of jurisdiction generally over all controversies which may be brought before the Interstate Commerce Commission. In every case in which it has been applied, the ground for its application has been fundamentally that stated by Mr. Justice White in the passage above quoted, namely, the need for protecting the Commission in the performance of its statutory obligation to maintain proper rate levels and to eliminate discrimination in rates and practices by insuring uniformity. That this requirement of consistency and uniformity in the application of statutory standards is the basis of the doctrine is shown, for example, in the opinion written by Mr. Justice Brandeis for this Court in *Great Northern Railway v. Merchants Elevator Co.*, 259 U. S. 285, where he said (at page 291):

"Whenever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. . . . It is required because the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission."

Clearly, the reason stated in the cases cited above, and particularly in the *Merchants Elevator Case*, as the basis for the doctrine of primary jurisdiction has no application in the present case, because the body to which it is claimed in this case that preliminary resort must be had, viz., the Adjustment Board, is not, as is the Interstate Commerce Commission, for example, an administrative or regulatory

or quasi-judicial tribunal charged with the maintenance of a statutory standard, such as the uniform maintenance of railroad rates, which would be impaired by the exercise of court jurisdiction without prior resort to the administrative tribunal.

The history and development of the powers of the Interstate Commerce Commission has been one of continuously granting more and more power to the Commission to assure uniformity in the treatment of shippers and the public all over the country with respect to the charges and practices of railroads. It is clear that Congress intended, by the Interstate Commerce Act, that the Commission should have complete control over the rates and charges made by the carriers, and, unless its primary power over matters of reasonableness and discrimination depending necessarily on technical and controversial facts be recognized and preserved, the very purpose of Congress would be defeated.

The interpretation of railroad labor contracts presents a very different problem. Congress, by passing the Railway Labor Act, did not establish a policy of providing uniformity in the collective bargaining agreements; on the contrary, its policy is declared to be to provide for free collective bargaining and the prompt and orderly settlement of disputes (45 U. S. C. § 151a). Such free collective bargaining between hundreds of carriers and their employees necessarily leads to a wide disparity between contracts, not to uniformity. To this end Congress provided two separate, distinct and different procedures. The first was the process of negotiation, mediation and fact-finding to cover disputes as to representation and the negotiation of changes in collective agreements. This procedure is mandatory and resort to the courts is foreclosed. *General Committee etc. v. Missouri-Kansas-Texas R. Co.*, 320 U. S. 323; *Switchmen's Union v. National Mediation Board*, 320 U. S. 297; *General Committee etc. v. Southern Pacific Co.*, 320 U. S. 338.

But for disputes involving the interpretation of existing collective bargaining agreements, Congress provided an

"adjustment" procedure to which the parties might submit their disputes. As we have pointed out above, this Court has never held that this was to be an exclusive procedure. Likewise, it is clear that there was no intention that the administrative procedure was for the purpose of securing uniformity. Congress spoke freely of its purpose to promote collective bargaining on every railroad, thereby preserving and encouraging the making of contracts with widely differing terms to meet the desires and needs of the employees and the carriers all over the country. There are hundreds of such contracts, each of which applies to a class of employees on a different carrier. The Adjustment Board could not achieve uniformity and still preserve the rights of the employees to negotiate and collectively agree with the carriers on their working conditions. In fact, the Board would go beyond the limits of its jurisdiction if it sought to achieve uniformity of conditions all over the country. (45 U. S. C. § 153 First (i)). It is thus seen that the purpose of the Adjustment Board procedure is the very antithesis of the uniformity which is the very heart and core of the Interstate Commerce Act.

Indeed, the National Railroad Adjustment Board is in no sense a regulatory body or quasi-judicial tribunal. It is simply an extremely informal body which makes decisions or awards, often through an outside referee who is not an "expert,"⁶ in controversies growing out of the interpretation of contracts. It has no statutory provisions to police and no statutory standards to apply. It is not charged with the duty of maintaining any uniformity of rates or practices or rules or working conditions. And finally, its decisions or awards are enforceable only by a suit brought in the courts where there is a trial *de novo* even as to the facts. (45 U. S. C. § 153 First (p)).

⁶ In its Fifteenth Annual Report to Congress submitted November 1, 1949, the National Mediation Board said: "Under the present system, there is a constant flow of new men serving as referees, none of whom under the law, can be associated with railroads or organizations, and hence their familiarity with labor practices in the railroad industry is necessarily limited." (p. 13)

The fundamental difference between the National Railroad Adjustment Board and administrative tribunals charged with the maintenance of statutory standards in the regulation of a particular field of activity was recognized by this Court in *Terminal Railroad Association of St. Louis v. Brotherhood of Railroad Trainmen*, 318 U. S. 1, when it held that the Adjustment Board was not vested by the Railway Labor Act with regulatory authority within the field of wages, hours, and working conditions in the railroad industry, so as to exclude regulatory action by a state commission within that field. In a unanimous opinion it was said:

"The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them. The national interest expressed by those Acts is not primarily in the working conditions as such. So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions. The federal interest that is fostered is to see that disagreement about conditions does not reach the point of interfering with interstate commerce. The Mediation Board and Adjustment Board act to compose differences that threaten continuity of work, not to remove conditions that threaten the health or safety of workers." (at p. 6).

Since Congress did not commit to the Adjustment Board any statutory standard requiring uniformity of application, there is no basis for presuming that Congress intended to vest the Board with an exclusive jurisdiction of the kind which under the primary jurisdiction doctrine is thought to be necessary to insure uniformity in the maintenance of a statutory standard. As this Court expressly held in the *Terminal Railroad Association Case*, "The enactment by Congress of the Railway Labor Act was not a preemption

of the field of regulating working conditions themselves," and therefore action by a state commission exercising administrative powers to regulate conditions within that field was not excluded. For the same reason, exercise by state courts of judicial powers to regulate and adjudicate relations between citizens of the state growing out of a contract between them should not be excluded—as it would be if the *Moore Case* is overruled or if this respondent is not permitted to maintain this suit—by the fact that a dispute submitted to the state courts for such adjudication is one which might have been, but had not been, submitted to the Adjustment Board.

From all of the above considerations it follows that the primary jurisdiction doctrine has no application with respect to the National Railroad Adjustment Board, since the reasons on which that doctrine is founded do not exist in the case of the Adjustment Board.

IV. The Legislative History Confirms and Supports the Decision in the Moore Case, and Shows That Congress Did Not Intend by the Creation of the Adjustment Board to Effect a Complete and Radical Change in the Character and Legal Effect of the Adjustment Procedure for Handling Railway Labor Disputes.

For this Court now to overrule the *Moore Case* and hold that neither party to a dispute over which the Adjustment Board has authority may have recourse to the courts before the submission of the dispute to the Board would be to hold, as this Court has said, that the adjustment "machinery provided for settling disputes was based on a philosophy of legal compulsion". *Moore v. Illinois Central R. Co.*, 312 U. S. 630, 635. It is submitted that the Court was right in deciding in that case that neither the language of the Act nor its legislative history indicated that anything more was intended by Congress than the establishment of a voluntary method of adjustment to which the parties could resort if they chose and which did not displace the ordinary jurisdic-

tion of the courts to adjudicate the dispute without prior submission to the Board. Reexamination of the Act in the light of its legislative history shows that this Court's conclusion in that respect in the *Moore Case* was correct.

The fact that by the Adjustment Board provisions of the Railway Labor Act of 1934 Congress effected certain modifications in the permissive procedure already embodied in the Transportation Act of 1920 and the Railway Labor Act of 1926 for the informal adjustment of disputes between carriers and their employees affords no basis whatever for a conclusion that it thereby intended to make judicial procedure for the determination of those disputes unavailable in the first instance. That the only object of Congress was to make such permissive machinery for informal adjustment more readily available and more useful, is clearly stated in the following language from the Report of the House Committee on Interstate and Foreign Commerce, in recommending for enactment the amendments of 1934 to the Railway Labor Act (House Report No. 1944, 73rd Congress, 2nd Session, pp. 2-3):

"The bill does not introduce any new principles into the existing Railway Labor Act, but it is designed to amend that act in order to correct the defects which have become evident as a result of 8 years of experience. It does not change the methods of conference, mediation, and voluntary arbitration to settle major disputes over wages and working conditions, which are provided in the Railway Labor Act of 1926, now in effect."

"The Railway Labor Act of 1926, now in effect, provides that representatives of the employees, for the purpose of collective bargaining, shall be selected without interference, influence, or coercion by railway management, but it does not provide the machinery necessary to determine who are to be such representatives."

"The second major purpose of the bill is to provide sufficient and effective means for the settlement of

minor disputes known as 'grievances', which develop from the interpretation and or application of the contracts between labor unions and the carriers, fixing wages and working conditions. * * * This bill, therefore, provides for the establishment of a national board of adjustment to which these disputes *may be submitted* if they shall not have been adjusted in conference between the parties."

Certainly this language neither expresses nor implies any disparagement of the judicial process as applied to railway labor disputes. The most that the language can be made to mean is that the settlement of controversies by compromise or "adjustment" may be desirable and that facilities should accordingly be provided therefor. It says nothing, and implies nothing, that would limit the right to a judicial determination of legal issues as to collective bargaining contract rights which the parties are unable or unwilling to settle informally. The two processes, of informal adjustment on the one hand and legal determination on the other hand, had already long been recognized as separately and alternatively available at the time when the R.R. amendments to the then existing Railway Labor Act of 1926 were adopted. Adjustment boards in one form or another had been a feature of labor relations in the railroad industry since the first World War. Between 1920 and 1926 functions of this character had been vested in the so-called Railway Labor Board established under Title III of the Transportation Act of 1920 (41 Stat. 469). Speaking of these functions and of their essentially different character from the judicial determination of a controversy, this Court said in *Pennsylvania Railroad v. Labor Board*, 261 U. S. 72, 84:

"But Title III was not enacted to provide a tribunal to determine what were the legal rights and obligations of railway employers and employees, or to enforce or to protect them: Courts can do that. The Labor Board was created to decide how the parties ought to exercise their legal rights so as to enable them to cooperate in

* running the railroad. It was to reach a fair compromise between the parties, without regard to the legal rights upon which each side might insist in a court of law."

Thus this Court recognized and emphasized that there is a useful and important function to be performed in facilitating voluntary compromises and settlements between employees and employers, but that this is a different function from the adjudication and protection of legal rights. As the quoted passage points out, the protection of legal rights is the function of courts and not of the agency of adjustment. The fact that an agency of adjustment is established cannot, therefore, be construed as indicating any intention on the part of Congress to preclude resort to the courts and thereby prevent the enforcement and protection of legal rights.

There is nothing in the legislative history of the Railway Labor Act of 1934 to indicate that Congress thought it was effecting any revolution in its previous policy. In fact the House Committee in its report specifically stated that "the bill does not introduce any new principles into the existing Railway Labor Act." (House Report No. 1944, 73rd Cong., 2nd Sess., p. 2). On the contrary, it is clear from the reports of both the Senate and House Committees that the provisions of the present Act establishing the National Railroad Adjustment Board were designed simply to correct certain supposed defects in the provisions of the Act of 1926, including defects in the operation of the adjustment machinery. The Act of 1926 contained a provision which purported to require the carriers and their employees to establish an adjustment board or adjustment boards by agreement; but since alternatives were left open to permit the establishment of separate boards for each carrier or of regional boards or a single national board, the boards which were actually established covered only a portion of the nation's railroad system. Furthermore, the Act provided no effective method of handling cases to a conclusion where the members of a Board disagreed and a deadlock resulted.

It was for the purpose of meeting these supposed defects in the Act of 1926 that the Act of 1934 was enacted, according to the Report of the House Committee (House Report No. 1944, 73rd Cong., 2nd Sess. p. 3):

"The present Railway Labor Act provides for the establishment of boards of adjustment by agreement. In many instances, however, the carriers and the employees have been unable to reach agreements to establish such boards. Further, the present act provides that when and if such boards are established by agreement, the employees and the carriers shall be equally represented on the boards.

" . . . the boards have been unable to reach a majority decision, and so, the proceedings have been deadlocked. . . . This condition should be corrected in the interest of industrial peace and of uninterrupted transportation service. This bill, therefore, provides for the establishment of a national board of adjustment to which these disputes *may be submitted* if they shall not have been adjusted in conference between the parties. The provisions as to the national board of adjustment are as follows: . . .

"(c) If any division of the Board should deadlock on a dispute, then the representatives on the Board will endeavor to select a neutral or impartial person; and if they are unable to agree upon the selection of such neutral person, then the United States Board of Mediation will appoint a neutral person. The dispute will then be again considered and a majority decision reached."

These were the principal and apparently the only changes which Congress had in mind in substituting the adjustment board provisions of the Act of 1934 for the provisions of the Act of 1926. It is significant that there appeared no intention whatever to affect or alter the provisions defining the nature and function of adjustment boards. The present Act establishes a National Board, since none had been established by agreement under the Act of 1926, but it still permits a carrier and its employees, or a group of carriers and their employees, to establish separate adjustment

boards by voluntary agreement (45 U. S. C. §153 Second) if they so desire, and where such a separate board is in existence, the National Board has no functions with reference to the disputes which are submitted to the separate board.⁷

The language of the Railway Labor Act of 1934 describing the functions of the National Railroad Adjustment Board (Section 3 First (i)) is borrowed practically verbatim from the language of Section 3 First (c) of the Act of 1926, with the single important difference that, whereas the Act of 1926 provided that, when an adjustment board had been set up by agreement, disputes "shall" be referred to the board, the Act of 1934, in referring to the statutory board, substitutes the permissive word "may." It is clear, as has been pointed out above (p. 29), that under the Act of 1926 the jurisdiction of the courts was unaffected by the adjustment procedure provided by that statute. By using completely parallel provisions in the two acts with respect to the functions and status of adjustment boards, it follows that Congress did not intend by the 1934 Act to substitute boards for the courts, or to require preliminary resort to an adjustment board as a prerequisite to recourse to the courts. Congress made this doubly sure when it substituted the permissive word "may" for the mandatory "shall" so as to make certain that reference to an adjustment board would be on a purely voluntary basis.

It is clear therefore that Congress did not intend by the 1934 amendments to the Railway Labor Act to give to the adjustment procedure for the settlement of railway labor disputes any effect or status different from that which it previously had. It is also clear that prior to the 1934 Act the adjustment procedure had not held such a status that preliminary resort thereto was a condition prerequisite

⁷ In its annual report referred to *supra*, note 6, the National Mediation Board recently urged the wide use of these separate boards as a means to relieve the critical backlog of cases on the docket of the Adjustment Board and possibly to prevent the breakdown of the Railway Labor Act (at p. 13).

to the right to bring a judicial proceeding in the courts. Not merely is there no evidence whatever of an intention on the part of Congress to make any change in this respect in the status of the adjustment procedure, but there is the strongest evidence of an express contrary intent, that is, an intent not to make any such change, in the statement quoted above from the House Committee's Report that the amendment "does not introduce any new principles into the existing Railway Labor Act."

Accordingly, it is clear that to construe the Act of 1934 as conferring exclusive jurisdiction on the National Railroad Adjustment Board would be to fly directly in the face of the legislative history of that Act and to affirm a Congressional intent which that history expressly denies.

V. The Decree of the South Carolina Court Leaves Petitioner Free to Exercise All Its Rights and Enjoy Its Privileges and Immunities Under the Railway Labor Act.

In petitioner's brief it is contended that the decree of the court below will have the effect of interfering with its rights of collective bargaining and other procedures for adjustment and settlement of disputes relating to interpretation and application of the collective agreement, because the decree purported to be a "final and binding declaration."

Petitioner complains that as a result of the decree "further efforts on the part of the petitioner to perform its statutory function to obtain a settlement of the dispute by negotiation must be abandoned not only in respect to this dispute but in respect to all 'similar' disputes that may arise in the future." (Bf., pp. 53-54).

This argument completely overlooks the basic difference between interpretation of an existing contract and the making of a new contract. Where a dispute exists over the interpretation of an existing contract, such a dispute must in the nature of things be settled some time, by some tribunal, by a "final and binding" decision. But such a decision does

not preclude petitioner from immediately bargaining with respondent for a change in the collective agreement as thus construed. Both the trial court and the court below expressly recognized the right of petitioner to seek a solution of its difficulties by undertaking to have the contract changed by following the machinery followed by law. In the decree itself, it is provided:

"Of course, if the defendant is not satisfied with the present provisions of the agreement, it is free to initiate amendments or changes by following the procedure provided in the last paragraph of the contract, and undertake to secure the desired relief by the normal processes of collective bargaining." (R. 570)

Thus petitioner is just as free now as it was before the commencement of this suit to handle claims and grievances or claims on behalf of its members or non-members, for that matter, provided petitioner is duly authorized to do so by the employees concerned. In such cases, this respondent has always made every attempt possible to dispose of such matters informally through correspondence or conference. Petitioner can always appeal such grievances and claims up to the highest officer designated by respondent as provided in Section 3, First (i) of the Act, 45 U. S. C. § 153 First (i), just as was done in this case. However, when the dispute is not settled and the parties cannot agree on the proper interpretation of the applicable contracts, either party is free to take the dispute to a proper tribunal to secure authoritative and binding interpretations that will dispose of the grievance or claims. Obviously, the award or decree of such a tribunal does not infringe on any rights or immunities of petitioner under the Railway Labor Act, which had as one of its purposes the peaceful and final disposition of all disputes or controversies.

Petitioner also criticizes the findings of the trial court with respect to the adequacy of the Adjustment Board remedy. It should be kept in mind that the trial court only con-

sidered this point in connection with its consideration of whether or not *in its discretion* it should make a declaration under the authority given it by the South Carolina Declaratory Judgment Act.

While it is clear that this Court does not have before it for review the wisdom of the trial court in exercising its discretion as it did, we would like to point out that the record does fully support the finding that it would take several years to obtain a decision from the Adjustment Board, both by the testimony of qualified witnesses and the official reports of the National Mediation Board. (R. 197-202). Indeed the critical condition with respect to the First Division of the Board, which has jurisdiction over such cases as this, is commented on at some length in the Fifteenth Annual Report of the National Mediation Board, including the Report of the National Railroad Adjustment Board, for the fiscal year ended June 30, 1949, which was transmitted to Congress on November 1, 1949. It said in part (page 12):

"The backlog of pending disputes continues to grow year after year. For example, the First Division docketed 1,226 new cases during 1949 while disposing of 731 cases. As a result the backlog grew from 2,347 cases at the beginning of the year to 2,842 as of June 30, 1949. Based upon the number of cases closed during the past year the Board had on hand at year's end nearly 4 years' work. Nor do these figures tell the whole story for with the prospect of such long delays in getting cases considered and settled by the First Division many organization representatives have withdrawn pending cases and have declined to submit any new cases until the situation is corrected and threaten frequently to use economic strength in disposing of the cases. For this reason the 2,842 docketed cases probably represent only a small fraction of the total number of such disputes pending settlement on the railroads of the country."

It is indeed surprising that petitioner should attempt to criticize the delay in securing the final judgment in the state courts in this case. It is true that the suit was filed

on July 12, 1945 and the final decree of the Supreme Court of South Carolina was handed down August 15, 1949. But most of this time is chargeable to the dilatory tactics of petitioner in attempting to forestall the trial court from taking jurisdiction in the first instance. Over a year and half were consumed in establishing the right to bring this suit under South Carolina law. The decree of the trial court was then entered on August 30, 1947 (R. 528) and the ensuing two years have been consumed in disposing of petitioner's appeal. It is thus seen that over three years of the time consumed is directly chargeable to petitioner, and that less than a year would normally be consumed in securing an authoritative decision by the South Carolina courts as against several years for an award of the Adjustment Board.

It is therefore clear that there is absolutely no substance to petitioner's argument that the declaratory judgment rendered by the South Carolina courts in the exercise of its discretion under the State Declaratory Judgment Act is in any way in derogation of petitioner's rights under the Railway Labor Act.

CONCLUSION.

For all the reasons and upon the authorities above set out, we respectfully submit that the judgment and decree of the South Carolina Supreme Court should be affirmed.

Respectfully submitted,

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CHARLES ELMORE CROPLEY

IN THE
Supreme Court of the United States

OCTOBER TERM, 1949

No. 438

ORDER OF RAILWAY CONDUCTORS OF AMERICA, an
unincorporated association, *Petitioner*,

v.

SOUTHERN RAILWAY COMPANY, a corporation organized and
existing under the laws of the State of Virginia.

On Writ of Certiorari to the Supreme Court of the State of
South Carolina.

**REPLY OF RESPONDENT TO MOTION OF RAILWAY
LABOR EXECUTIVES' ASSOCIATION FOR LEAVE
TO FILE A BRIEF AMICUS CURIAE.**

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**REPLY OF RESPONDENT TO MOTION OF RAILWAY
LABOR EXECUTIVES' ASSOCIATION FOR LEAVE
TO FILE A BRIEF AMICUS CURIAE.**

Now comes the respondent Southern Railway Company,
and prays the Court to deny the petition of the Railway
Labor Executives' Association for leave to file a brief
amicus curiae for the following reasons:

1. The petitioner, Order of Railway Conductors of
America, as stated in the motion is affiliated with the

Railway Labor Executives' Association so that there is no need for the movant to file a brief to protect the interests of its members.

2. The motion fails to state any facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties as required by Rule 27(9)(b).

3. To grant the motion will in effect be permitting petitioner to file two main briefs without showing any need for such duplication as an aid to the Court.

1. Movant's Interests Are Already Adequately Represented.

The Railway Labor Executives' Association says that it is an unincorporated association of 21 affiliated labor organizations, one of which is the petitioner Order of Railway Conductors of America.

The petitioner has vigorously defended this case from its inception, having been represented by able counsel not only of the South Carolina bar but also by associate counsel from Cedar Rapids, Iowa, who are also members of the bar of this Court. The very issues in which the movant asserts its interest have been fully litigated in the lower courts and were argued twice before the court below after full and lengthy briefs were filed. There is no reason to believe that this Court needs assistance from an *amicus curiae* to be sure that all proper issues now before it will be presented properly. The petitioner has already filed a full and complete brief covering the law and the facts. As the petitioner is a member of the movant organization, its counsel are and have been in a position to receive the suggestions of the organizations affiliated with the Railway Labor Executives' Association, and to present them adequately to this Court both by written brief and oral argument.

2. The Motion Fails to Meet the Requirements of Rule 27.

Par. 9(b) of Rule 27 requires that a motion for leave to file a brief *amicus curiae* shall "set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties" which will be covered in the proposed brief.

After stating movant's interest, which is identical with that of petitioner, the motion merely states the issue in substantially the same language set forth in petitioner's brief now on file in this Court, and then confesses that the contentions of respondent will be "capably and strenuously opposed by counsel for the petitioner."

The motion nowhere points to facts or questions of law that it intends to discuss as *amicus curiae*. It must be concluded that it simply proposes to discuss again the very points already covered by the briefs of the parties.

3. To Grant the Motion Would in Effect Be Permitting Petitioner to File a Second Main Brief.

The petitioner now has on file its brief covering the issues before the Court in this case. All of the matters referred to in the motion of Railway Labor Executives' Association are discussed and argued in the light of the facts of this case and the general interest of the railroad industry, the employees and their union representatives.

We have pointed out that the petitioner is a member of the movant organization, and hence movant is not in the position of a stander-by who seeks to assist the Court by discussing facts or issues not adequately dealt with by the parties before the Court, which is the proper function of an *amicus*. On the contrary, it really seeks the rights of a party to file a main brief so that petitioner can have the benefit of arguing its cause by brief twice. The motion shows on its face that movant's desire to file a brief is not based on a desire to help the Court, but is because:

"It is felt that the interests of the Association and all its affiliated organizations are so directly concerned."

The petitioner had ample opportunity to intervene in this case while it was pending in the courts below, and cannot now be heard to complain at not being given the rights of a party.

Conclusion.

The respondent Southern Railway Company respectfully prays that this honorable Court, in its discretion, deny the motion of the Railway Labor Executives' Association the privilege of filing herein a brief *amicus curiae*.

Respectfully submitted,

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